Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

ROBERT CUNNINGHAM,

Petitioner,

vs.

DARYL GATES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Heck v. Humphrey*, 512 U.S. 477 (1994), operate as a bar to the accrual of a claim under 42 U.S.C. § 1983 when *habeas corpus* relief is impossible as a matter of law?

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PETITION FOR WRIT OF CERTIORARI

Robert Cunningham petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order and amended opinion of the Court of Appeals in *Cunningham v. Gates* is reported at 312 F.3d 1148 (9th Cir. 2002), *as amended on denial of reh'g*, 2003 WL 115192 (9th Cir. January 14, 2003). Appendix A. Appendix B contains the district court disposition. *Cunningham v. Gates*, 2001 WL 1855344 (C.D. Cal. 2001)

JURISDICTION

The disposition of the Court of Appeals was rendered on January 14, 2003, and this Petition timely will have been filed within 90 days' of the disposition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Among "hotly debated" facts, *Cunningham*, 2003 WL 115192 * 1, on June 26, 1996, members of the Los Angeles Police Department's secretive, undercover Special Investigations Section (the "SIS") apprehended petitioner by shooting him, firing eighteen shotgun blasts and handguns shots into the stationary and trapped getaway car in which petitioner was a passenger, paralyzing him and rendering him a paraplegic. The scene was so chaotic

that police of the jurisdiction in which the events occurred, Ventura County, California, had difficulty distinguishing among petitioner, his companion, who was killed, and the SIS officers, and ended up arresting all of them. *Id.* at * 1-2.

Petitioner thereafter was convicted of attempted murder, felony murder of his partner in the holdup by provoking the police officers into shooting at him and killing him, robbery, and burglary. Petitioner lost his appeal to California's intermediate court of appeal, and the California Supreme Court denied his petition for review on January 25, 2000. He filed neither a state nor a federal *habeas corpus*. His "convictions have not been reversed, expunged, or called into question by issuance of a writ of habeas corpus," *id.* at * 3, nor could they be, because he lost his appeals and, as a matter of law, *habeas corpus* review is unavailable to him.

Under *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999), his time within which to file a *federal habeas* petition would have been one year plus 90 days from the date on which the state criminal conviction became final on January 25, 2000, that is by April 25, 2001, if the case had involved a federal issue.

Therefore, on April 25, 2001, it became impossible, as a matter of law, for petitioner to seek *federal habeas* relief.

In *Cunningham v. Gates*, 229 F.3d 1271 (9th Cir. 2000), *as amended*, on interlocutory appeal, the court below held that it was in "serious disagreement" with the district court's denial of defendants' summary judgment motion based on *Heck v. Humphrey*, 512 U.S. 477 (1994), but was without jurisdiction to entertain that issue on

interlocutory appeal, and it remanded the case to the district court with its encouragement to revisit the issue. *Cunningham*, 2003 WL 115192 * 3 & n. 2.

The new district court judge assigned to the case, after the self-recusal of the original judge, *Cunningham v. Gates*, 45 F. Supp. 2d 1271 (C.D. Cal. 1999), then rendered judgment as a matter of law to defendants based on the ground that *Heck* barred the accrual of petitioner's claims. *Cunningham*, 2001 WL 1855344.

On the current appeal, the Ninth Circuit decided that even though petitioner, as a matter of law, no longer could file a federal *habeas* petition because "he is time-barred from seeking habeas relief[,]" *Cunningham*, 2003 WL 115192 * 3 n. 3, nevertheless, because he still is in custody, this fact alone does not "take[ ] his § 1983 claim out of *Heck*'s purview." *Ibid.* The court ruled that "Cunningham's failure *timely* to pursue habeas remedies [does not] take[ ] his § 1983 claim out of *Heck*'s purview." *Ibid.* (emphasis added). But Cunningham decided not to seek *habeas* relief: he did not miss a deadline for seeking *habeas* relief. The voluntary choice not to seek *habeas* relief does not, under *Heck*, operate to bar a section 1983 action. But it does both do away with any legitimate reason to apply *Heck* and make application of *Heck* baseless and inappropriate.

Thus, the court below completely ignored both this Court's holding in *Heck* and its stated *raison d'etre* of *Heck*, that, at the intersection of federal *habeas corpus* and section 1983, a section 1983 plaintiff would be foreclosed from using the favorable results of a section 1983 action to attack his or her criminal conviction, and substituted in their places either the mere condition of being in custody or the *theoretical*, but not actual, possibility of use of a

favorable section 1983 result to attack a criminal conviction as a bar to bringing a section 1983 action.[1]

REASONS FOR GRANTING THE PETITION

1. The court below decided issues contrary to the controlling Supreme Court precedent in *Heck* and the stated basis for *Heck*'s rule.

2. There is a conflict among the circuit courts of appeals on the issues.

3. The court below has created an anomaly in which the mere facts of penal incarceration or *theoretical* conflict between a section 1983 result and a criminal conviction operate as a bar to bringing a section 1983 action.

4. Public officers who have used methods that are alien to our Constitution, will be permitted to escape the consequences of their bad conduct, when those whom they injure are in custody, but have not sought and no longer can seek *habeas* relief.

---

[1] The stated rationale for *Heck*, preventing a criminal conviction from attack by a favorable, but inconsistent, result in a section 1983 action, did not warrant *Heck*'s rule that a section 1983 be barred. Completely barring the bringing of a section 1983 action until a criminal conviction were overturned, as *Heck* did, unnecessarily and by far exceeded *Heck*'s stated rationale. A more tailored approach in *Heck* would have been a rule that a section 1983 action could not be utilized to attack a criminal conviction. That result here can be achieved. The actual ruling in *Heck*, when compared to the ill it purported to staunch, suggests *Heck* may have overreached its stated purpose.

5. The issues presented will affect numerous federal civil rights cases.

ARGUMENT

1. *HECK V. HUMPHREY* IS *NOT* A BAR TO THE ACCRUAL OF A PLAINTIFF'S CIVIL RIGHTS CLAIMS BECAUSE *HECK* IS INAPPLICABLE WHEN, AS HERE, AS A MATTER OF LAW, NO *HABEAS CORPUS* RELIEF IS AVAILABLE.

Heck provides that if a section 1983 "plaintiff's action, even if successful, will ***not*** demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the [section 1983] action should be allowed to proceed. . . ." 512 U.S. at 487 (emphasis in original; footnotes omitted). When a section 1983 plaintiff has exhausted his direct appeals and may not, as a matter of law, seek *habeas* relief, *Heck* cannot be applicable to bar his section 1983 claims.

Heck is nothing more than a peculiar rule of accrual, *id.* at 487, 489, applicable only when there is an "intersection" between a person's ability to seek **federal** *habeas corpus* and that same person's ability to seek relief in a federal civil rights action. *Id.* at 480 ("[t]his case lies at the intersection of . . . the Civil Rights Act . . . and the federal habeas corpus statute"); *see id.* at 487 n. 8 (when a state criminal appeal or state habeas petition is pending or cognizable in state court, abstention by a federal court might be appropriate in a pending section 1983 action). Moreover, *Heck* by its terms is applicable ***only when*** a section 1983 action is premised on a claim of malicious prosecution deriving from a criminal conviction, 512 U.S.

at 479 & n. 2 (the Court expressly stated "we accept the characterization [of plaintiff's claims made by] the lower courts [and the lower courts characterized the claims as 'plaintiff claims he would not have been convicted had the defendants not violated his constitutional rights(,)'" *Heck v. Humphrey*, 997 F.2d 355, 357 [7th Cir. 1993]), *see id.* at 484, and from which federal *habeas* relief ***actually*** is available. *Spencer v. Kemna*, 118 S. Ct. 978, 989, 992 n. 8 (1999) (Justices Souter, O'Connor, Ginsburg, and Breyer concurring, Justice Stevens dissenting); *see Haddad v. State of California*, 64 F. Supp. 2d 930, 937-38 (C.D. Cal. 1999) (five justices, a majority, now have expressed their agreement with Justice Souter's position as he explained it in *Heck* and *Spencer, id.* at 937-38, rejecting defense contention that Justice Souter's position in *Spencer* "did not garner a sufficient number of votes to be a true holding, ***the majority of U.S. Circuit and District Court cases since* Spencer *have followed, or adopted the reasoning in Justice Souter's concurring opinion***"; emphasis added); *Zupan v. Brown*, 5 F. Supp. 2d 792, 797, 798 (N.D. Cal. 1998); *accord, Guerrero v. Gates*, 110 F. Supp. 2d 1287, 1290 (C.D. Cal. 2000); *Jenkins v. Haubert*, 179 F.3d 19, 25-26 (2d Cir. 1999); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *White v. Phillips*, 34 F. Supp. 2d 1038, 1041-42 (W.D. La. 1998); *Johnson v. Freeburn*, 29 F. Supp. 2d 764, 775 (E.D. Mich. 1998); *see also, U.S. v. Palomba*, 182 F.3d 1121, 1123 (9th Cir. 1999) (adopting the holding in *Spencer v. Kemna*, 523 U.S. 1 [1998], finding that appeal from sentence of supervised release moot once supervised release term is complete because there no longer is any "custody"). Here, because federal *habeas* relief ***actually*** is ***un***available, *Heck* may not be used as a bar to petitioner's section 1983 claims.

In fact, *Spencer* completely disposes of the issue of whether one who was convicted of a crime and who no longer is able to apply for *habeas* relief may be barred from bringing a section 1983 action by *Heck*'s accrual rule.

Justice Souter, in his *Spencer* concurrence, in which Justices O'Connor, Ginsburg, and Breyer joined, stated the following:

> *Heck* did not hold that a released prisoner . . . is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result. For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly.
>
> * * *
>
> [T]he plain breadth of § 1983 [should not] be unjustifiably limited at the expense of persons not "in custody" within the meaning of the habeas statute. . . . [A]ny application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody, when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas. The better view, then, is that a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement ***without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy***. . . . After a

> prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.

523 U.S. at 19-21 (emphasis added). This logically is equally true here, when as a matter of law there can be no *habeas* relief. When there is added to this Justice Stevens' dissent in *Spencer*, which should control the outcome on this petition, it is clear that when one is unable, as a matter of law, to apply for federal *habeas* relief, *Heck*'s bar does not apply, if only because it would be impossible, as a matter of both fact and law, for there to be any "intersection of section 1983 and federal *habeas*." There can be an intersection only when there is more than one avenue of legal relief, and when there is only one legal remedy available, as here section 1983, there is no intersection, and the parallactic rule of *Heck* is inapplicable.

Justice Stevens' dissent in *Spencer* should control, completely and absolutely, the outcome on this petition:

> Given the fact that petitioner ***does not have a remedy under the habeas statute***, it should be perfectly clear, as Justice SOUTER explains, that ***he may bring an action under 42 U.S.C. § 1983***.

Id. at 992 n. 8 (emphasis added).

The collision sought to be staunched by *Heck*'s peculiar accrual rule hardly is even a near miss in this case, not only because of *Spencer* and its progeny, but also for a myriad of other reasons, including the fact that the "sanctity" of plaintiff's criminal conviction simply is not in issue or at risk in his section 1983 case, in which only civil liability is sought to be imposed, and success in which

could not, as a matter of law, be used to affect in any wise plaintiff's criminal conviction.

The Ninth Circuit's conclusion that "Cunningham's § 1983 claims . . . are barred by *Heck* because they would necessarily imply the invalidity of his state convictions for felony murder and attempted murder[,]" *Cunningham*, 2003 WL 115192 * 5, is beside the point of *Heck* for the reason that Cunningham legally is incapacitated from and therefore could not ***utilize any potential finding in a section 1983 action to attack his criminal convictions***. This is so because the only stated purpose of *Heck* is to prevent, at the intersection of federal *habeas corpus* and section 1983, a collision between the two. Here, because it would be impossible, as a matter of law, for there to be a collision, there is no legitimate reason for the rule in this case. *See, e.g.,* Cal. Civ. Code § 3510: "When the reason for a rule ceases, so should the rule itself."

"The underlying purpose of proceedings under the 'Great Writ' of habeas corpus has traditionally been to 'inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail. . . . " *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 Harv. L. Rev. 1551, 1553 (2001). *Habeas* relief goes only to the fact or duration of detention. *Edwards v. Balisok*, 520 U.S. 641, 646-47 (1997); *see also Leamer v. Fauver*, 288 F.3d 532, 540 (3d Cir. 2002) (citing *Edwards*). But when there can be no inquiry at all into the legality of detention and no judicial relief any longer is authorized to discharge a prisoner or his admission to bail, there can be no application of the *Heck* rule.

A section 1983 plaintiff who has been convicted of a criminal offense may proceed with a section 1983 action when, as here, no *habeas* remedy any longer exists. In *Jenkins*, the court held that "*Heck* and *Edwards* do not bar a § 1983 claim . . . where [*sic*] the prisoner is unable to [make any] challenge . . . through a petition for federal habeas corpus." 179 F.3d at 21.

In *Maleng v. Cook*, 490 U.S. 488, 491 (1989) (*per curiam*), this Court held that "[f]ederal courts lack subject matter jurisdiction over challenges to state court convictions where [*sic*] the sentence is completely expired." It also is true that federal courts lack jurisdiction of *habeas* petitions that would be untimely, as here. Thus, when there can be no timely federal *habeas* petition, there can be no federal *habeas* jurisdiction, there can be no intersection of section 1983 and *habeas*, and there can be no application of *Heck*.

Thus, because plaintiff may not, as a matter of law, seek *habeas* relief, *Heck* does not apply to bar the accrual of his civil rights claims and the court below erred when it used *Heck* as the basis for dismissal of plaintiff's civil rights claims.

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THIS ISSUE.

As set forth above, the majority of United States circuit and district court cases decided since *Spencer* have followed or adopted the reasoning in Justice Souter's concurring opinion in *Spencer*. *See, Zupan v. Brown*, 5 F. Supp. 2d 792, 797, 798 (N.D. Cal. 1998); *accord*, *Guerrero v. Gates*, 110 F. Supp. 2d 1287, 1290 (C.D. Cal. 2000); *Jenkins v. Haubert*, 179 F.3d 19, 25-26 (2d Cir. 1999); *Carr*

v. O'Leary, 167 F.3d 1124, 1127 (7th Cir. 1999); *White v. Phillips*, 34 F. Supp. 2d 1038, 1041-42 (W.D. La. 1998); *Johnson v. Freeburn*, 29 F. Supp. 2d 764, 775 (E.D. Mich. 1998). *See also*, *U.S. v. Palomba*, 182 F.3d 1121, 1123 (9th Cir. 1999) (adopting the holding in *Spencer v. Kemna*, 523 U.S. 1 [1998], finding moot an appeal from sentence of supervised release once supervised release term is complete because there no longer is any "custody"). There is a direct conflict between the Ninth Circuit's holding that *Heck* is a bar in this case and the Second and Seventh Circuit's holdings, respectively, in *Jenkins*, 179 F.3d at 25-26, and *Carr*, 167 F.3d at 1127. For this reason, certiorari should be granted.

3. THE COURT BELOW HAS CREATED AN UNINTENDED ANOMALY.

The court below in effect has created an unintended anomaly by which the mere fact of penal incarceration operates as a bar to brining a section 1983 action. This Court could not have intended that result in *Heck*, and for this reason certiorari should be granted.

4. THE FACT OF INCARCERATION SHOULD NOT PREVENT SECTION 1983 ACTIONS.

Public officers allegedly have used methods that are alien to our Constitution, such as here, by police allegedly "simply beg[inning] to shoot, firing eighteen shotgun blasts and handgun shots . . . , killing [one man], leaving Cunningham paralyzed, and wounding two fellow SIS officers[,] [in a] scene [that was] chaos [and which also resulted in other police] end[ing] up arresting everyone

[including the suspects and the defendants,]" *Cunningham*, 2003 WL 115192 * 1, and by the "provo[king] of [a] firestorm[,]" *id.* at * 3, and they will be permitted under the disposition of the court below to escape the consequences of their alleged bad conduct merely when, and because, those whom they allegedly injure are in custody though they have not sought and cannot seek *habeas* relief. This Court could not have intended this result to follow from *Heck*, and for this reason certiorari should be granted. That the results in petitioner's section 1983 action "would *imply* the invalidity of his state convictions," *Cunningham*, 2003 WL 115192 * 5 (emphasis added), can be of no moment when, as here, *as a matter of reality and law* those results *will not invalidate* a state court conviction. Reality must trump illusory or phantom implication.

CONCLUSION

For the reasons set forth, and because it is of enormous importance to a large number of potential section 1983 plaintiffs that their claims not be barred either because of the condition of their confinement or because *theoretically*, but not in actuality, the results of their section 1983 claims could (but can't) be used to attack their criminal convictions, this Court should grant the petition for certiorari.

Respectfully submitted,

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD
STEPHEN YAGMAN
Counsel of Record

Dated: January 28, 2003.

APPENDIX A

2003 WL 115192

United States Court of Appeals,

Robert CUNNINGHAM; Armand Soly, Betty Soly, in their individual capacities and as successors in interest to their deceased son, Daniel Soly, and in their capacities as representatives of the classes described fully hereinbelow; Alpha Doe, Beta Doe, in their capacity as a representative of the class described fully hereinbelow; Alfredo Olivas, Harold Bridges, B.K. Williams, in their individual capacities and in their capacities as representatives of the classes described fully hereinbelow, Plaintiffs-Appellants,

v.

Daryl GATES; Willie Williams; Tom Bradley; Richard Riordan; Richard Alarcon; Richard Alatorre; Marvin Braude; Laura Chick; John Ferraro; Michael Feuer; Ruth Galanter; Michael Hernandez; Nate Holden; Mark Ridley-Thomas; Rudy Svornich; Joel Wachs; Rita Walters; Ernani Bernardi; David Cunningham; Robert Farrell; Joan Milke Flores; Gloria Molina; Joy Picus; Arthur Snyder; Michael Woo; Zev Yaroslavsky; Herbert Boeckmann; Raymond Fisher; Deidre Hall; Art Mattox; Edith Perez; James Fisk; Gary Grennbaum; Maxwell Greenberg; Enrique Hernandez; Marguerite Justice; Barbara L. Schlei; Reva Tooley; Robert Weil; Stephen Yslas; Richard Hegelson; Flora Trostler; Joseph Callian; Brian Davis; Joseph Freia; Edward Guiza; James Harris; John Helms; Richard Spellman; James Tippings; John Tortorici; Lawrence Winston; Phillip Wixon; Gary Zerbe; Richard Zierenberg; City of Los Angeles; Jerry Brooks; John D. White; John Trundle; Robert Rochhoft; Daniel Koenig; Hal Bernson; Stephen Gavin; Emmett McGaughey; Robert M. Talcott; Janet Bogigian; Mary Burwell Cooper; Ellen M. Fawls; Michael K. Fox; James K. Hahn; Katherine J. Hamilton; Theodore D. Heyck; Thomas Hokinson; Stuart D. Hotchkiss; Annette Keller;

Lenore Lashley; Richard James; Honey A. Lewis; Ward G. McConnell; John T. Neville; James Pearson; Robert J. Pulone; Phillip Shiner; Phillip Sugar; Don W. Vincent, II; Tayo Popoola; G. Daniel Woodard; Dennis Conte; Gregory Berg; Randolph Mancini; Does, 1-100 who are either policymakers, city council members or L.A. Board of Police Commissioner members or employees of the City of L.A. Attorney's Office both past & present; Does, 100-201 who are members, or employees, or officers of the LAPD, both past & present, Defendants-Appellees.

No. 01-56339.

Argued and Submitted Oct. 10, 2002.
Filed Dec. 13, 2002.
Order Amending Opinion Filed Jan. 14, 2003.

Stephen Yagman, Kathryn Bloomfield, Marion R. Yagman, and Joseph Reichmann, Yagman & Yagman & Reichman, Venice Beach, CA, for the appellants.

Rockard J. Delgadillo, Daniel Woodard, and Amy Jo Field, Los Angeles, CA, for the appellees.

Appeal from the United States District Court for the Central District of California; Consuelo B. Marshall, Chief Judge, Presiding. D.C. No. CV-96-02666- CBM.

Before ALFRED T. GOODWIN, PAMELA ANN RYMER, and M. MARGARET McKEOWN, Circuit Judges.

ORDER

McKEOWN, Circuit Judge.

The Opinion filed on December 13, 2002 is amended as follows:

At slip opinion page 13, line 8: replace "the police fired first" with "he did not provoke the firestorm."

At slip opinion page 13, line 15: replace "the police fired first" with "Cunningham was not the provocateur of the firestorm."

With this amendment to the opinion, the panel has unanimously voted to deny the appellants' petition for rehearing.

2002 WL 31780177

United States Court of Appeals,
Ninth Circuit.

Robert CUNNINGHAM; Armand Soly, Betty Soly, in their individual capacities and as successors in interest to their deceased son, Daniel Soly, and in their capacities as representatives of the classes described fully hereinbelow; Alpha Doe, Beta Doe, in their capacity as a representative of the class described fully hereinbelow; Alfredo Olivas, Harold Bridges, B.K. Williams, in their individual capacities and in their capacities as representatives of the classes described fully hereinbelow,
Plaintiffs-Appellants,

v.

Daryl GATES; Willie Williams; Tom Bradley; Richard Riordan; Richard Alarcon; Richard Alatorre; Marvin Braude; Laura Chick; John Ferraro; Michael Feuer; Ruth Galanter; Michael Hernandez; Nate Holden; Mark Ridley-Thomas; Rudy Svornich; Joel Wachs; Rita Walters; Ernani Bernardi; David Cunningham; Robert Farrell; Joan Milke Flores; Gloria Molina; Joy Picus; Arthur Snyder; Michael Woo; Zev Yaroslavsky; Herbert Boeckmann; Raymond Fisher; Deidre Hall; Art Mattox; Edith Perez; James Fisk; Gary Grennbaum; Maxwell Greenberg; Enrique Hernandez; Marguerite Justice; Barbara L. Schlei; Reva Tooley; Robert Weil; Stephen Yslas; Richard Hegelson; Flora Trostler; Joseph Callian; Brian Davis; Joseph Freia; Edward Guiza; James Harris; John Helms; Richard Spellman; James Tippings; John Tortorici; Lawrence Winston; Phillip Wixon; Gary Zerbe; Richard Zierenberg; City of Los Angeles; Jerry Brooks; John D. White; John Trundle; Robert Rochhoft; Daniel Koenig; Hal

Bernson; Stephen Gavin; Emmett McGaughey; Robert M. Talcott; Janet Bogigian; Mary Burwell Cooper; Ellen M. Fawls; Michael K. Fox; James K. Hahn; Katherine J. Hamilton; Theodore D. Heyck Thomas Hokinson; Stuart D. Hotchkiss; Annette Keller; Lenore Lashley; Richard James; Honey A. Lewis; Ward G. McConnell; John T. Neville; James Pearson; Robert J. Pulone; Phillip Shiner; Phillip Sugar; Don W. Vincent, II; Tayo Popoola; G. Daniel Woodard; Dennis Conte; Gregory Berg; Randolph Mancini; Does, 1-100 who are either policymakers, city council members or L.A. Board of Police Commissioner members or employees of the City of L.A. Attorney's Office both past & present; Does, 100-201 who are members, or employees, or officers of the Lapd, both past & present, Defendants-Appellees.

No. 01-56339.

Argued and Submitted Oct. 10, 2002 –
Pasadena, California.
Filed Dec. 13, 2002.

Appeal from the United States District Court for the Central District of California. Consuelo B. Marshall, Chief Judge, Presiding.

Stephen Yagman, Kathryn Bloomfield, Marion R. Yagman, and Joseph Reichmann, Yagman & Yagman & Reichman, Venice Beach, California, for the appellants.

Rockard J. Delgadillo, Daniel Woodard, and Amy Jo Field, Office of the City Attorney, Los Angeles, California, for the appellees.

Before: ALFRED T. GOODWIN, PAMELA ANN RYMER, and M. MARGARET McKEOWN, Circuit Judges.

OPINION

McKEOWN, Circuit J.

This case arose from the bloody aftermath of a robbery in the Newbury Park neighborhood of Los Angeles. After police surrounded the getaway car, the two robbers, Robert Cunningham and Daniel Soly, exchanged gunfire with the police. Soly died and Cunningham was seriously injured. Cunningham was later tried and convicted of, among other things, murdering Soly by provoking the police to shoot. Soly's parents and Cunningham filed civil rights claims against the police and other defendants associated with the City of Los Angeles, alleging that police used excessive force in violation of the Fourth and Fourteenth Amendments.

We must decide whether Cunningham's claims are barred under *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), because the theories he now asserts would call into question the validity of his state convictions. We must also decide whether the claims of Soly's parents are similarly barred by Cunningham's convictions.

BACKGROUND

The facts and procedural history of this complex case are described more fully in our earlier opinion, *Cunningham v. Gates,* 229 F.3d 1271 (9th Cir.2000), so our discussion here is limited to the background relevant to the issues before us.

I. THE ROBBERY

The Los Angeles Police Department's ("LAPD") Special Investigation Section ("SIS") learned in May of 1995 that Daniel Soly and Robert Cunningham had been involved in an armed robbery in Simi Valley. On June 26, 1995, SIS officers started surveillance of the two men after receiving tips that more criminal activity was afoot. That evening, SIS officers followed Cunningham and Soly to Newbury Park, California, and watched as they robbed the Southwest Liquor and Deli.

Cunningham and Soly left the store and ran to their getaway car. Plainclothes SIS officers in unmarked cars surrounded the car, boxing it in. This tactic, known as "jamming," is often used by special units to gain surprise over armed suspects and to prevent escape and dangerous high-speed chases. *See Cunningham,* 229 F.3d at 1278 n. 7.

What happened next is hotly debated. Cunningham and Soly allege in their complaint that SIS officers simply began to shoot, firing eighteen shotgun blasts and handgun shots into the getaway car, killing Soly, leaving Cunningham paralyzed, and wounding two fellow SIS officers. The SIS officers insist that Cunningham and Soly fired first. Whatever happened, the scene was chaos; the Ventura County Sheriff deputies called to the scene had difficulty distinguishing between the plainclothes police and the suspects and ended up arresting everyone.

II. CUNNINGHAM'S STATE CONVICTIONS

Cunningham was charged with several crimes related to the robbery and gunfight. A California jury convicted Cunningham of three counts of attempting to murder SIS

officers by firing a weapon at them; Soly's murder by provoking the officers into shooting at the getaway car; robbery; and burglary. Cunningham based his defense on the theory that the police fired first, and that he acted in self-defense when returning fire. The trial judge instructed the jury that they were to find Cunningham guilty of felony murder if, during the commission of the robbery,

> 1. The defendant also committed an intentional provocative act;
>
> 2. A peace officer, in response to the provocative act, killed a perpetrator of the crime of robbery;
>
> 3. The defendant's commission of the intentional provocative act was a cause of the death of Daniel Soly.

The instructions defined a "provocative act" as

> 1. Intentional,
>
> 2. The natural consequences of the act were dangerous to human life,
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life,
>
> 4. The act was above and beyond the act required for the commission of the crime of robbery, and
>
> 5. The act was not in self defense.

On the attempted murder counts, the jury was instructed that it must find that Cunningham knew or should have known that he was shooting at police officers engaged in the performance of their duties.

III. THE § 1983 CLAIMS

Daniel Soly's parents, Armand and Betty Soly (the "Solys") and Robert Cunningham (collectively, the "plaintiffs"), filed claims under 42 U.S.C. § 1983 against various groups of defendants, including SIS officers who were directly involved in the gun battle with Cunningham and Soly (the "shooting officers"), LAPD officers who were not directly involved (the "non-shooting officers"), supervisory officers, members of the Los Angeles Police Commission, some members of the Los Angeles City Council, then-Mayor Richard Riordan, and various assistant Los Angeles city attorneys (the "City Officials"). The Solys and Cunningham alleged Fourth and Fourteenth Amendment violations as a result of police use of excessive force.

The overarching theory alleged in the complaint was that all of the officers and City Officials engaged in a "standard operating procedure" designed to create a situation likely to result in the death of the plaintiffs. In carrying out their part of this plan, according to the complaint, SIS officers set up surveillance of Cunningham and Soly, permitted them to rob the liquor store, jammed their car, fired on them without identifying themselves as police, and later covered up evidence of SIS misconduct.

The City Officials and the various officers filed motions for summary judgment, all but one of them claiming qualified immunity, and all of them arguing that the claims were barred by *Heck* because plaintiffs' theories would necessarily imply the invalidity of Cunningham's

state criminal convictions.[1] Judge Letts granted Mayor Riordan's motion, but denied summary judgment for the others, rejecting their qualified immunity claims and concluding that *Heck* did not apply.

The City Officials and the officers filed an interlocutory appeal. We held that we did not have jurisdiction to consider the denial of summary judgment on the *Heck*-related defense. *Cunningham,* 229 F.3d at 1284-85. We noted, however, our "serious disagreement" with Judge Letts's ruling and encouraged the parties and the district court to revisit the *Heck* issue on remand. *Id.* at 1285 n. 21. We then reversed, on qualified immunity grounds, the denial of summary judgment to some of the non-shooting officers, the council members, the City attorneys, and an SIS supervisor. *Id.* at 1286-94. The case returned to the district court for proceedings against the remaining officers.

On remand, the case was reassigned to Chief Judge Marshall, who reconsidered the *Heck* issue and granted summary judgment to all of the remaining officials. That decision is the basis of this appeal.

DISCUSSION

Under *Heck,* 512 U.S. at 487, "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be

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[1] The City Officials and LAPD officers also sought summary judgment on grounds unrelated to the issues we now consider.

dismissed." *Smithart v. Towery,* 79 F.3d 951, 952 (9th Cir.1996). In California, a non-party's claim may be precluded by a judgment against a party if they were in privity. *Lucido v. Superior Ct.,* 51 Cal.3d 335, 272 Cal.Rptr. 767, 795 P.2d 1223, 1225 (Cal.1990). On appeal from summary judgment, we review these issues de novo. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.1999).[2] We address the claims separately with respect to each plaintiff.

I. CUNNINGHAM'S CLAIMS

As Cunningham's convictions have not been reversed, expunged, or called into question by issuance of a writ of habeas corpus, Cunningham cannot pursue claims under § 1983 if they are based on theories that "necessarily imply the invalidity of his conviction[s] or sentence[s]." *Heck,* 512 U.S. at 487.[3] In evaluating whether claims are

[2] The plaintiffs argue that Chief Judge Marshall abused her discretion by departing from the law of the case to hold that the claims are barred by *Heck.* In light of the procedural posture of the case, we conclude that Chief Judge Marshall did not abuse her discretion in reconsidering the application of *Heck.*

[3] Relying on *Spencer v. Kemna,* 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), Cunningham urges this court to hold that *Heck* is inapplicable to his § 1983 suit because, for him, habeas relief is "impossible as a matter of law." In *Spencer,* Justice Souter, in a concurrence joined by Justices O'Connor, Ginsburg, and Breyer, suggested that a § 1983 plaintiff who is not "in custody" may bring a § 1983 action establishing the unconstitutionality of a conviction without being bound to satisfy *Heck*'s favorable termination requirement, because obtaining habeas relief "would be impossible as a matter of law." *Spencer,* 523 U.S. at 21. Cunningham argues that his situation is akin to those who are "not in custody" because he is time-barred from seeking habeas relief. We decline to hold that Cunningham's failure timely to pursue habeas remedies takes his § 1983 claim out of *Heck*'s purview.

barred by *Heck,* an important touchstone is whether a § 1983 plaintiff could prevail only by negating "an element of the offense of which he has been convicted." *Id.* at 487 n. 6. The district court concluded that Cunningham's claims are barred under *Heck* because the complaint disputed several factual issues that the state jury had already resolved against him. We agree.

Cunningham's claims are squarely barred to the extent they depend on the theory that the police fired first. In accord with the jury instructions, Cunningham's conviction for felony murder required the jury to find that he intentionally provoked the deadly police response, and that he did not act in self-defense. Any civil claim that Cunningham was not the provocateur necessarily fails as a result of the jury verdict.

But the complaint asserts a broader theory that does not depend on a finding that the police fired first. Cunningham accuses the SIS officers of using excessive force to deliberately create a situation that provoked him into firing. We recognized such a danger creation theory in *Alexander v. City of San Francisco,* 29 F.3d 1355 (9th Cir.1994) and recently addressed it in *Billington v. Smith,* 292 F.3d 1177, 1188-89 (9th Cir.2002). In *Alexander,* the plaintiff's estate alleged that police officers, by entering his house with a battering ram and drawn guns to execute an administrative search warrant, created a dangerous situation that led to the decedent's ill-fated attempt to fire his gun at the officers. 29 F.3d at 1366. Even though the officers did not use excessive force at the moment they fired back at the decedent, a jury could conclude that their prior use of force "was excessive in relation to the purpose for which it was used (ensuring the immediate execution of a forcible entry inspection warrant)," so the plaintiff's

estate could pursue its § 1983 claims. *Id.* at 1367. The Tenth Circuit has also recognized the danger creation theory. *See Allen v. Muskogee,* 119 F.3d 837, 840 (10th Cir.1997).

In order to prevail under the danger creation theory, however, Cunningham would need to call into question other elements necessary for his state convictions. In contrast to the police in *Alexander,* the SIS officers did not begin the chain of events that resulted in Cunningham's injuries. In convicting him of felony murder, the jury necessarily found that, pursuant to the jury instructions, Cunningham's firing at the police occurred during the commission of a robbery. The SIS officers' jamming of the getaway car falls within the temporal scope of Cunningham's crime and is part of a single act for which the jury found that Cunningham bears responsibility. Under the jury instructions that were given, the jury could not have convicted Cunningham for attempted murder unless the jury concluded that at the moment Cunningham fired on the SIS officers, he knew or should have known that they were police officers acting within the scope of their duties. This circumstance makes it impossible for Cunningham to prove, as he must to prevail on his § 1983 claim, that the police used excessive force when they jammed the getaway car because it would necessarily imply they were not acting within the scope of their duties.

Cunningham asserts that, even if the police did not create a dangerous situation by jamming his car, and fired only when provoked, he should be allowed to proceed under the theory that the police nonetheless used excessive force by responding to that provocation with the shotgun blasts and pistol shots. Cunningham urges us to rely on *Hernandez v. City of Los Angeles,* 624 F.2d 935,

937-38 (9th Cir.1980). In *Hernandez,* we held that a conviction for resisting arrest and rejection of a self-defense claim did not foreclose the possibility that the police still used excessive force in carrying out the arrest. *Id.* Although we decided *Hernandez* many years before the Supreme Court decided *Heck,* in a more recent decision, we held that *Heck* did not bar a § 1983 excessive force claim, despite the plaintiff's conviction for assaulting the sheriff and state patrolman who arrested him. *Smithart,* 79 F.3d at 952.

A close examination of *Smithart* reveals a very different factual setting from Cunningham's situation. The plaintiff in *Smithart* tried to use his truck to run over the sheriff and state patrolman, an act for which he was later convicted of assault. *Id.* at 952-53. The plaintiff claimed that, after he got out of his truck, the sheriff and patrolman used excessive force to arrest him. *Id.* at 952. The assault conviction and the excessive force claim did not arise from the same acts. Indeed, once he was out of the truck and without access to his "assault weapon," the officers had no need to use excessive force to subdue the plaintiff or to protect themselves.

Here, however, there was no break between Cunningham's provocative act of firing on the police and the police response that he claims was excessive. Indeed, in convicting Cunningham of felony murder, the jury concluded that the police response was a natural consequence of Cunningham's provocative act. Because the two are so closely interrelated, Cunningham's conviction forecloses his excessive force claim against the SIS officers.

Cunningham's § 1983 claims, in each of their incarnations, are barred under *Heck* because they would necessarily imply the invalidity of his state convictions for felony murder and attempted murder.

II. THE SOLYS' CLAIMS

Although the Solys' § 1983 claims are identical to Cunningham's, Soly died during the shooting and was never charged or convicted of any crime related to the events of that night. Nonetheless, the officers argue that the Solys are precluded by the California common law of privity from relitigating issues that were already decided in Cunningham's trial. *See Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 375, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment.").

Under California law, the collateral estoppel effect of Cunningham's convictions would prevent the Solys from pursuing their § 1983 claims if (1) the issues necessarily decided at Cunningham's trial are identical to the issues in the Solys' § 1983 claims; (2) Cunningham's trial resulted in a judgment on the merits; and (3) the Solys were in privity with Cunningham during his criminal trial. *See State Farm Mut. Auto. Ins. Co. v. Davis,* 7 F.3d 180, 183 (9th Cir.1993) (quoting *Clemmer v. Hartford Ins. Co.,* 22 Cal.3d 865, 151 Cal.Rptr. 285, 587 P.2d 1098, 1102 (Cal.1978)). In examining the collateral estoppel effect of a criminal trial on a third party who did not, and could not, participate, we are aware that "'the rule of collateral estoppel in criminal cases is not to be applied with the

hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.'" *United States v. Carbullido,* 307 F.3d 957, 961 (9th Cir.2002) (quoting *Ashe v. Swenson,* 397 U.S. 436, 444, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)); *see also Vandenberg v. Superior Ct.,* 21 Cal.4th 815, 88 Cal.Rptr.2d 366, 982 P.2d 229, 237 (Cal.1999) (noting that "a particular danger of injustice arises when collateral estoppel is invoked by a nonparty to the prior litigation.").

Although we agree with the district court that the first two elements are satisfied, we do not agree that the Solys were in privity with Cunningham at his trial. To establish privity, the officers must show that the Solys "'had an identity or community of interest with, and adequate representation by, the losing party in the first action'" and that, under the circumstances, the Solys "'should reasonably have expected to be bound by the prior adjudication.'" *State Farm,* 7 F.3d at 183 (quoting *Clemmer,* 151 Cal.Rptr. 285, 587 P.2d at 1102).

Under the first requirement for privity, we cannot conclude that the Solys' interests at Cunningham's trial were so similar that Cunningham was their "virtual representative." *United States v. Geophysical Corp.,* 732 F.2d 693, 697 (9th Cir.1984) (citation omitted); *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n,* 60 Cal.App.4th 1053, 71 Cal.Rptr.2d 77, 88 (Cal.Ct.App.1998). Cunningham was charged with, among other things, the murder of Soly, and some of the jury's findings that have preclusive effect on Cunningham's § 1983 claims were only necessary for that felony murder conviction.

It is impossible to say, with the kind of certainty required to apply collateral estoppel, that, even were

he to have faced the same charges as Cunningham, Soly's interests at trial would not have sharply diverged from Cunningham's. *See Citizens for Open Access,* 71 Cal.Rptr.2d at 88 ("If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity."). Obviously, had Soly been alive, Cunningham would not have faced a felony murder charge for his death. In the trial that did occur, the Solys were not represented by counsel and had no voice in the proceedings. Nor did the jury have the benefit of evidence or argument from Soly's perspective. Looking into a crystal ball to divine how the trial might have proceeded in that alternate universe would require nothing short of rank speculation on our part – an exercise that is the antithesis of the confidence necessary to invoke collateral estoppel.

We also note that the circumstances of Cunningham's trial do not suggest that the Solys could expect to be bound by the results. The jury's verdict rested on Cunningham's actions, not Soly's. It was Cunningham's provocation, not Soly's, that was the focus of Cunningham's trial. And in convicting Cunningham of felony murder, the jury necessarily concluded that he was *a* cause, not *the* cause, of Soly's death. Thus, Cunningham's conviction does not on its face foreclose the possibility that the police also contributed to Soly's death.

The officers cannot establish privity under either of the required prongs of the privity test. Common law privity exceeds the bounds of common sense when a murder conviction prevents not only the murderer, but his victim, from seeking relief. Because the Solys' § 1983 claims are not barred under *Heck* or common law privity,

we reverse with regard to their claims and remand to the district court for further proceedings.

AFFIRMED as to Cunningham's claims and REVERSED and REMANDED as to the Solys' claims. Each party shall bear costs in accord with Federal Rule of Appellate Procedure 39.

APPENDIX B

United States District Court, C.D. California,
Western Division.

Robert CUNNINGHAM, Armand Soly and Betty Soly, Plaintiffs

v.

CITY OF LOS ANGELES, William L. Williams, Herbert Boeckmann, Raymond Fisher, Deirdre Hill, Art Mattox, Edith Perez, Gary Greenbaum, Enrique Hernandez, Brian Davis, Edward Guiza, James Harris, Lawrence Winston, Phillip James Wixon, John D. White, Gregory Berg, John Trundle, and Ruchhoft, Defendants

No. CV 96-2666 CBM(CTX), CV 96-4517 CBM(CTX).

July 2, 2001.

Stephen Yagman, Kathryn S. Bloomfield, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA, for plaintiffs.

Cory M. Brente, Amy Jo Field, Rockard J. Delgadillo, Los Angeles, CA, for defendants.

ORDER Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' and Defendants' Request for Judicial Notice as Moot

MARSHALL, District J.

The matters before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, are (1) Defendants' Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues, (2) Plaintiffs' Request for Judicial Notice, and (3) Defendants' Request for Judicial Notice. Counsel appeared before the Court on

April 23, 2001. Upon consideration of the arguments presented, the Court grants Defendants' Motion for Summary Judgment and denies the parties' Requests for Judicial Notice as moot.

JURISDICTION

This action is before the Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343.

BACKGROUND & PROCEDURAL HISTORY

Robert Cunningham and Daniel Soly committed an armed robbery at the Southwest Liquor and Deli store in Newbury Park, California on June 26, 1995. Cunningham and Soly were under surveillance by officers in the Special Investigation Section ("SIS Officers") of the Los Angeles Police Department ("LAPD") at the time of the robbery. The SIS Officers followed Cunningham and Soly to the liquor store and used their police cars to "jam" the get-away vehicle after Cunningham and Soly exited the liquor store. Cunningham exchanged gunfire with Officers Winston, Wixon, Harris and Guiza. Soly was killed and Cunningham, Officers Winston and Wixon were seriously injured. Cunningham was convicted of Soly's murder, robbery of the liquor store, conspiracy to commit robbery and attempted murder of Officers Harris, Winston and Wixon.

Daniel Soly's parents – Armand and Betty Soly – and Robert Cunningham filed these actions on April 15, 1996 and June 12, 1996, seeking declaratory, injunctive and monetary relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1651. Defendants include the City of Los Angeles, members of the Los Angeles Police Commission ("Police

Commissioners"), and shooting, non-shooting and supervisory SIS Officers. Plaintiffs allege that Defendants used, or acquiesced in the use of, excessive force during the arrest of Cunningham and Soly. Plaintiffs further allege that SIS officers falsified documents and operated under a "code of silence" while the Police Commissioners knowingly maintained policies encouraging such conduct.

Defendants filed a motion for summary judgment in 1997, on the ground that Plaintiffs' section 1983 claims are barred by *Heck v. Humphry,* 512 U.S. 477 (1994). This Court, Judge J. Spencer Letts presiding,[1] denied Defendants' motion on November 25, 1997. The Ninth Circuit, on appeal from related orders[2] by Judge Letts, expressed "serious disagreement" with Judge Letts' finding that Plaintiffs' claims are not barred by *Heck. Cunningham v. Gates,* 229 F.3d 1271, 1285 n. 21 (9th Cir.2000).

Defendants filed a Motion for Summary Judgment on March 5, 2001, arguing that Plaintiffs' claims are barred by *Heck.* Plaintiffs filed an Opposition on April 6, 2001.[3] Defendants' Reply was filed on April 18, 2001.

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[1] Judge Letts recused himself from presiding over this action on April 12, 1999. The case was randomly assigned to Judge Consuelo B. Marshall on April 30, 1999.

[2] Defendants appealed Judge Letts' orders denying Defendants' motions for summary judgment based on qualified immunity. *See Cunningham v. Gates,* 989 F.Supp. 1256 (C.D.Cal.1997); *Cunningham v. Gates,* 989 F.Supp. 1262 (C.D.Cal.1997).

[3] On March 22, 2001, the Court granted to Plaintiffs an extension to file an Opposition to Defendants' Motion for Summary Judgment.

DISCUSSION

I. Reconsidering Judge Letts' Order dated November 25, 1997

Plaintiffs argue that Defendants' Motion for Summary Judgment is improper because they fail to comply with Central District Local Rule 7.16.

"[A] court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Cuddy,* 147 F.3d 1111, 1114 (9th Cir.1998) (quotation omitted). A court may reconsider a ruling if "the first decision was clearly erroneous." *Id.* The Ninth Circuit, on appeal, stated that Judge Letts' finding that Plaintiffs' claims are not barred by *Heck* may be erroneous.[4] *See Cunningham v. Gates,* 229 F.3d 1271, 1285 n. 21 (9th Cir.2000).

Based on the foregoing, the Court finds that it may properly reconsider Judge Letts' finding that Plaintiffs' claims are not barred by *Heck v. Humphry,* 512 U.S. 477 (1994).

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[4] The Ninth Circuit stated:

> [W]e feel compelled to express our serious disagreement with the district court's ruling. It seems quite clear that Cunningham's section 1983 action would be barred under Heck and its progeny. In Cunningham's criminal trial, a jury rejected virtually every issue raised in Cunningham's section 1983 action. Moreover, it seems quite likely that Soly's action would be *Heck*-barred based on California's common law of privity. . . . Thus, for the reasons outlined above, we encourage the parties in the case and the judge who replaced Judge Letts to revisit this issue.

Cunningham, 229 F.3d at 1285 n. 21.

II. Defendants' Motion for Summary Judgment

Defendants argue that they are entitled to summary judgment because, *inter alia,* Plaintiffs' claims are barred by *Heck v. Humphry.*

Federal Rule of Civil Procedure 56(c) permits summary judgment against a party when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law.*" FED. R. CIV. P. 56(c) (emphasis added). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the nonmoving party has the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *Id.* The Court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage and draws all inferences in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-31 (9th Cir.1987).

A. Preclusion of Plaintiffs' Claims by *Heck*

The Supreme Court, in *Heck v. Humphry,* 512 U.S. 477 (1994), held that a state prisoner could not bring a section 1983 claim if a judgment in his favor would "necessarily demonstrate[ ] the invalidity of [his] conviction." *Heck,* 512 U.S. at 481-82. The Court stated:

> [T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus . . . .

Id. at 486-87. In *Heck,* the plaintiff was convicted of voluntary manslaughter in state court and was serving a 15-year prison sentence when he filed a section 1983 action. *Id.* at 478. The plaintiff alleged that his prosecutors conducted an "unlawful, unreasonable and arbitrary investigation" leading to plaintiff's arrest, "knowingly destroyed" exculpatory evidence, and caused an "unlawful voice identification procedure" to be used at trial. *Id.* at 478-79. The complaint sought monetary damages, but not injunctive relief or release from confinement. *Id.* at 479. The Court stated that a state prisoner is not permitted to "collateral[ly] attack [his] conviction through the vehicle of a civil suit" – except by a habeas corpus request. *See id.* at 482. Permitting a state prisoner to challenge his conviction or confinement through a section 1983 action would contravene "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* at 484.

A section 1983 action necessarily implies the invalidity of a criminal conviction if "[i]n order to prevail . . . [the plaintiff] would have to negate an element of the offence of which he has been convicted." *Id.* at 486 n. 6. *Heck* bars a section 1983 action if the conviction "is fundamentally inconsistent with the unlawful behavior for which section

1983 damages are sought." *Smithart v. Towery,* 79 F.3d 951, 952 (9th Cir.1996). A state prisoner cannot recover for a harm that implies his conviction should not have occurred. *Anderson v. County of Montgomery,* 111 F.3d 494, 499 (7th Cir.1997), *overruled on other grounds by DeWalt v. Carter,* 224 F.3d 607 (7th Cir.2000).

Heck may potentially bar a section 1983 claim for use of excessive force during an arrest to the extent such claim, if successful, would necessarily imply the invalidity of the plaintiff's conviction. *See Hudson v. Hughes,* 98 F.3d 868, 872 (5th Cir.1996). In *Hudson,* the plaintiff, who had been convicted of battery of an officer, filed a section 1983 claim, alleging that the officer used excessive force when arresting him. The plaintiff's conviction for battery was based on plaintiff's resistence of arrest. The Fifth Circuit stated:

> [B]ecause the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines the conviction.

Id. at 873. The court held that the plaintiff's section 1983 claim for excessive force was barred by *Heck. Id.* Similarly, in *Hainze v. Richards,* 207 F.3d 795 (5th Cir.2000), the Fifth Circuit stated that "based on *Heck,* an excessive force claim under section 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events." *Hainze,* 297 F.3d at 798-99.

1. *Cunningham's Section 1983 Claim*

The jury in Cunningham's state criminal action was instructed that Cunningham is guilty of Soly's murder if:

> (1) The crime of robbery was committed; (2) During the commission of the crime, the defendant also committed an intentional provocative act; (3) A peace officer, in response to the provocative act, killed a perpetrator of the crime of robbery; and (4) The defendant's commission of the intentional provocative act was a cause of the death of Daniel Soly.

Defendants' Motion, Ex. 6. The jury instructions stated that an "intentional provocative act" does not include an act of self-defense. *Id.* The jury was instructed that Cunningham is guilty of the attempted murder of the three SIS Officers if:

> (1) A direct but ineffectual act was done by one person towards killing another human being; and
>
> (2) The person committing such act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being.

Jury Instructions for Counts 2-4 (Defendants' Motion, Ex. 6). The jury was also required to find that Cunningham knew or should have known that the victims were police officers engaged in the performance of their duties. *Id.* Cunningham was convicted of Soly's murder and the attempted murder of three SIS Officers. Cunningham's convictions still stand.

Plaintiffs allege, in the present action, that the SIS Officers violated section 1983 by using excessive force while arresting Cunningham and Soly. The Third Amended Complaint states that the SIS Officers:

> without announcing themselves as police, opened fire with approximately 18 shotgun blasts and shots from handguns; all with the intent of taking the law into their own hands, and murdering [Cunningham and Soly], and thereby murdering Daniel Soly and crippling and paralyzing Cunningham.

Third Amended Complaint ¶ 10. Plaintiffs allege that the SIS Officers shot one another. *Id.* at ¶ 10. Plaintiffs argue that the following facts are in dispute: (1) whether the SIS officers shot first; (2) whether Cunningham shot at the officers in self-defense; (3) whether Soly was dead when Cunningham fired his gun; (4) whether Cunningham posed a threat to the officers when Soly was shot; (5) whether there was a conspiracy to rob the liquor store; and (6) whether Soly was shot without provocation. Plaintiff's Statement of Genuine Issues ¶¶ 1-16, 19.

Plaintiffs' allegations, if found to be true, would necessarily imply the invalidity of several elements of the criminal charges of which Cunningham was convicted. For example, to find Cunningham guilty of Soly's murder, the jury had to find that Cunningham did not act in self-defense and that Cunningham's conduct resulted in Soly's death. Furthermore, the jury in the criminal trial had to find that Cunningham knew that the persons jamming his car were police officers to convict Cunningham of attempted murder.

Plaintiffs argue that a claim for excessive force may be based on a showing that defendants created the situation in which force against the plaintiff became necessary. The Court does not dispute that Plaintiffs may have a cognizable § 1983 claim if such allegations were true. *See Alexander v. City & County of San Francisco,* 29 F.3d 1355, 1366

(9th Cir.1994), *overruled on other grounds by Acri v. Varian Associates, Inc.,* 114 F.3d 999 (9th Cir.1997). However, pursuant to *Heck,* Cunningham's § 1983 action does not accrue until Cunningham's conviction has been overturned or declared invalid.

Based on the foregoing, the Court GRANTS Defendants' Motion for Summary Judgment as to Cunningham.

2. *The Solys' § 1983 Claim*

Defendants argue that the Solys' claims are barred by *Heck.* The Supreme Court in Heck held that a convicted criminal defendant cannot use § 1983 to collaterally attack his own conviction. Heck, 512 U.S. at 484. This Court declines to expand that holding in *Heck* to preclude a plaintiff from bringing a § 1983 claim that, if successful, would necessarily imply the invalidity of another person's conviction. Daniel Soly, who died at the scene of the shooting, was never charged nor convicted of any crime related to the shooting. *Heck* is inapplicable to the Solys' § 1983 claim. However, this is not the end of the Court's inquiry.

Defendants argue that the Solys are precluded by California's common law of privity from relitigating issues litigated in Cunningham's state criminal trial. The Supreme Court has held that the res judicata effect of state court decisions in subsequent § 1983 actions is a matter of state law. *Migra v. Warren County School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Federal courts are required to give state court judgments the same preclusive effect they would have under state law in federal court. *Id.; Allen v. McCurry*, 449 U.S. 90 (1980) (finding that state criminal conviction may have a preclusive effect on

subsequent § 1983 action in federal court). In *Allen v. McCurry*, Willie McCurry, at his criminal trial for possession of heroin, invoked the Fourth and Fourteenth Amendments to suppress evidence that had been seized from his home by police. The district court denied McCurry's suppression motion and McCurry was subsequently convicted by a jury. McCurry filed a § 1983 action against the officers who had entered his home and seized the evidence. The Supreme Court held that the state criminal judgment may have a preclusive effect on issues raised in the subsequent § 1983 action. *Allen*, 449 U.S. at 103-04. The Court stated:

> [N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings.
>
> *Id.*

Plaintiffs argue that, in *Heck v. Humphry,* the Supreme Court declined to adopt a § 1983 analysis based on issue preclusion. The Supreme Court rejected the argument that a favorable ruling in a section 1983 action may have a preclusive effect on a subsequent challenge to a state conviction. The Court stated that "[w]hile we have no occasion to rule on the matter at this time, it is at least plain that preclusion will not necessarily be an automatic,

or even a permissible, effect." *Id.* at 488. The Court, in *Heck,* did not hold that a state criminal action cannot have a preclusive effect on a § 1983 action in federal court.

California's doctrine of issues preclusion may prohibit a § 1983 plaintiff from relitigating issues litigated in the criminal trial of plaintiff or someone in privity in [sic] plaintiff. The purpose of issue preclusion is to prevent relitigation of an identical issue with the same party or his privy and to promote judicial economy. *Sabek, Inc. v. Engelhard Corp.*, 65 Cal.App. 4th 992, 997 (1998). Issue preclusion applies if:

> (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; and (2) the previous proceedings resulted in a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the prior proceeding.

People v. Meredith, 11 Cal.App. 4th 1548, 1555 (1993); *accord Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990). "[I]dentity of parties or privity is a requirement of due process of law." *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 874 (1978). Privity exists where "the non-party is sufficiently close to the original case to afford application of the principle of preclusion." *People v. Drinkhouse*, 4 Cal.App.3d 931, 937 (1970); *accord Martin v. County of Los Angeles*, 51 Cal.App. 4th 688, 700 (1997). The California Supreme Court has held:

> In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party

> in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.
>
> *Clemmer*, 22 Cal.3d at 875.

Most of the factual disputes identified in Plaintiffs' Statement of Genuine Issues are identical to the issues presented in Cunningham's criminal trial. For example, the issue of whether Cunningham shot at the SIS Officers in self-defense was decided by the jury as an element of the murder charge against Cunningham. The jury in the criminal trial necessarily determined that the SIS Officers were not the first aggressors when it determined that Cunningham did not act in self-defense. The criminal jury necessarily decided that Daniel Soly died after Cunningham fired at police when it determined that Cunningham committed a provocative act resulting in Daniel Soly's death. Furthermore, the jury expressly considered whether Cunningham knew that the persons who jammed the automobile were police officers. The Solys' section 1983 claim is based primarily on conduct that was necessarily adjudicated in the state criminal action.

Defendants argue that the Solys are precluded from relitigating any issues that were necessarily decided by the jury in Cunningham's criminal trial. However, this is true only if the Solys are in privity with Cunningham. Defendants rely upon the Ninth Circuit's statement that "it seems quite likely that Soly's action would be *Heck*-barred based on California's common law of privity." *Cunningham v. Gates,* 229 F.3d 1271, 1285 n. 21 (9th Cir.2000). However, the Ninth Circuit stated that it lacked jurisdiction to address this issue. Defendants also rely upon *Echevarria v. Rivera Garcia,* 977 F.Supp. 112

(D.P.R.1997). In *Echevarria,* the family members of an inmate, who died while his petition for writ of habeas corpus was under appeal, filed a § 1983 action based on malicious prosecution. The inmate and two co-defendants had been convicted of first degree murder. The co-defendants also had appeals from denials of writ of habeas corpus pending. The district court held that the family members' § 1983 claim was barred by *Heck. Echevarria,* 977 F.Supp. at 116. The district court "venture[d] to declare" in dicta that if the inmate's co-defendant was successful in overturning his conviction, the plaintiffs might be able to bring their § 1983 action. *Id.*

The Solys argue that Daniel Soly did not share an identity of interests with Cunningham because Daniel Soly could have contended that both the SIS Officers and Cunningham were responsible for his death. *See* Plaintiff's Opposition at 40. The fact that the Solys may potentially have asserted a theory of recovery adverse to Cunningham's interest does not change the reality that, in this case, they have not. The Solys and Cunningham, who are represented by the same counsel, have consistently asserted in the Complaint, amended Complaints and other pleadings before this Court an identical, nonadverse theory of recovery under § 1983 – namely, the SIS Officers intentionally created a situation in which excessive force against Cunningham and Daniel Soly became necessary. *See, e.g.,* Third Amended Complaint ¶ 10. Furthermore, the jury in Cunningham's criminal trial found that Cunningham and Daniel Soly were co-conspirators.

The Court finds that the Solys are in privity with Cunningham and thus, are precluded from relitigating issues necessarily decided in Cunningham's criminal trial. The Solys have not identified any factual issues, which are

not barred by the doctrine of issue preclusion, which would support a § 1983 claim against Defendants. Based on the foregoing, the Court GRANTS Defendants' Motion for Summary Judgment as to the Solys. The Court need not address Defendants' remaining arguments regarding the liability of the SIS Officers and Police Commissioners. The Court denies Plaintiffs' and Defendants' Requests for Judicial Notice, which relate to the liability of the SIS Officers and Police Commissioners, as moot.

CONCLUSION

Defendants' Motion for Summary Judgment is GRANTED. The Court DENIES Defendants' Request for Judicial Notice and Plaintiffs' Request for Judicial Notice as moot.

SO ORDERED.

APPENDIX C

229 F.3d 1271

United States Court of Appeals,
Ninth Circuit.

Robert CUNNINGHAM; Armand Soly, in his individual capacity & as successor in interest to his deceased son, Daniel Soly, & in his capacity as a representative of the classes described fully hereinbelow; Betty Soly, in her individual capacity & as successor in interest to her deceased son, Daniel Soly, & in her capacity as a representative of the classes described fully hereinbelow,
Plaintiffs-Appellees,
v.
Daryl GATES, Defendant, William L. Williams; Richard Alarcon; Richard Alatorre; Hal Bernson; Marvin Braude; Laura Chick; John Ferraro; Michael Feuer; Ruth Galanter; Jackie Goldberg; Michael Hernandez; Nate Holden; Mark Ridley-Thomas; Rudy Svornich; Joel Wachs; Rita Walters; Herbert Boeckmann; Raymond Fisher; Deirdre Hill; Art Mattox; Edith Perez; Gary Greenbaum; Enrique Hernandez; Mary Burwell-Cooper; Janet G. Bogigian; Ellen M. Fawls; Michael K. Fox; James K. Hahn; Katherine J. Hamilton; Richard M. Helgeson; Thomas C. Hokinson; Stuart D. Hotchkiss; Annette Keller; Lenore Lashley; Honey A. Lewis; Ward G. McConnell; John T. Neville; James H. Pearson; Robert J. Pulone; Phllip [sic] Shiner; Phillip J. Sugar; Flora Trostler; Don W. Vincent, II; G. Daniel Woodard; Joseph Callian; Brian Davis; Joseph Freia; Edward Guiza; James Harris; Richard Spelman; James Tippings; John Tortorici; Lawrence Winston; Phillip James Wixon; Gary Zerby; Richard Zierenberg; Tayo Popoola; Jerry Brooks; John D. White; Dennis Conte; Gregory Berg; Randolph

Mancini; John Trundle; Robert Rochhoft; Daniel Koenig, Defendants-Appellants.
Robert Cunningham; Armand Soly, in his individual capacity & as successor in interest to his deceased son, Daniel Soly, & in his capacity as a representative of the classes described fully hereinbelow; Betty Soly, in her individual capacity & as successor in interest to her deceased son, Daniel Soly, & in her capacity as a representative of the classes described fully hereinbelow, Plaintiffs-Appellees,

v.

Daryl Gates, Defendant,
City of Los Angeles; William L. Williams; John Helms; Joseph Callian; Brian Davis; Joseph Freia; Edward Guiza; James Harris; Richard Spelman; James Tippings; John Tortorici; Lawrence Winston; Phillip James Wixon; Gary Zerby; Richard Zierenberg; Jerry Brooks; John D. White; Gregory Berg; John Trundle; Robert Rochhoft; Daniel Koenig, Defendants-Appellants.
Grover Smith, Plaintiff-Appellee,

v.

Daryl Gates, Defendant,
Richard Alatorre; Hal Bernson; Laura Chick; Michael Feuer; Michael Hernandez; Mark Ridley-Thomas; Joel Wachs; Rita Walters; Raymond Fisher; Art Mattox, Defendants-Appellants.
Robert Cunningham; Armand Soly, in his individual capacity & as successor in interest to his deceased son, Daniel Soly, & in his capacity as a representative of the classes described fully hereinbelow; Betty Soly, in her individual capacity & as successor in interest to her deceased son, Daniel Soly, & in her capacity as a representative of the classes described fully hereinbelow; Grover Smith; G. Nicoletti; D. Lyons; Michael Smith, Plaintiffs-Appellees,

v.

Daryl Gates, Defendant,
William L. Williams; John Helms; Brian Davis; Joseph Freia; Richard Spelman; Lawrence Winston; Phillip James Wixon; Richard Zierenberg, Defendants-Appellants.
Grover Smith; Unknown, Fifty Unknown Named Plaintiffs, all in their capacities as representatives of the classes described fully hereinbelow; Doe Alpha, in his/her capacity as a representative of the class described fully hereinbelow; Roe Beta, in his/her capacity as a representative of the class described fully hereinbelow, Plaintiffs-Appellees,

v.

Daryl Gates, Defendant,
James K. Hahn; Thomas C. Hokinson; Annette Keller; James H. Pearson; Don W. Vincent, II; G. Daniel Woodard, Defendants-Appellants.
Grover Smith; Unknown, 50 Unknown Named Plaintiffs all in their individual capacities and all in their capacities as representatives of the classes described fully hereinbelow; Doe Alpha, in his/her capacity as a representative of the class described fully hereinbelow; Roe Beta, in his/her capacity as a representative of the class described fully hereinbelow, Plaintiffs-Appellees,

v.

Daniel Koenig; James Tippings; James Toma; Charlie Bennett; Rodney Rodriguez; Gary Holbrook; John Fruge; James Harris; Robert Kraus; James Kilgore; Angela Dumler, Defendants-Appellants.

Nos. 98-55108, 98-55208, 98-55855, 98-56077, 98-56081 and 99-55136.

Argued and Submitted Feb. 9, 2000.
Filed Sept. 15, 2000.
As Amended Oct. 31, 2000.

Lisa S. Berger, Deputy City Attorney, Los Angeles, California, and Louis R. Miller, Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, Los Angeles, California, for the defendants-appellants.

Stephen Yagman (argued), Marion R. Yagman, Joesph Reichmann, Kathryn S. Bloomfield, Yagman & Yagman, Venice Beach, California, Richard H. Millard, Los Angeles, California, for the plaintiffs-appellees.

Appeals from the United States District Court for the Central District of California; J. Spencer Letts, District Judge, Presiding. D.C. Nos. CV-96-02666-JSL, CV-97-01286-JSL.

Before: HAWKINS, MAGILL,[1] and THOMAS, Circuit Judges.

MAGILL, Senior Circuit Judge:

This consolidated appeal requires us to decide whether certain Los Angeles city officials are entitled to qualified immunity from suits initiated by several alleged victims of excessive force by the Los Angeles Police Department (LAPD). In three separate lawsuits, Robert Cunningham, Grover Smith, and the parents of Daniel Soly,[2] sued the city of Los Angeles (City) and numerous City officials, alleging the defendants either used excessive

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[1] The Honorable Frank Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

[2] Decedent Daniel Soly's parents, Armand and Betty Soly, bring this action in their individual capacities and on behalf of their deceased son who was killed in a shootout with LAPD officers following the armed robbery of the Southwest Liquor and Deli.

force, acquiesced in the use of excessive force, or engaged in an unconstitutional policy of indemnifying LAPD officers against punitive damage awards in excessive force cases.[3] Defendants in the *Cunningham* and *Soly* actions moved for summary judgment based on qualified immunity from suit and *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).[4] The district court[5] granted summary judgment to the City's mayor, Richard Riordan, but otherwise denied all motions for summary judgment.[6] *See Cunningham v. Gates*, 989 F.Supp. 1256 (C.D.Cal.1997); *Cunningham v. Gates*, 989 F.Supp. 1262 (C.D.Cal.1997). Defendants in the *Smith* action also moved for summary judgment based on qualified immunity. In denying the *Smith* defendants' motions for

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[3] On September 29, 1997, the district court consolidated the cases involved in the instant appeal for discovery and pre-trial motions.

[4] In *Heck v. Humphrey*, the Supreme Court held that in order to recover damages for harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)

[5] The Honorable J. Spencer Letts, United States District Judge for the Central District of California. During the pendency of this appeal, Judge Letts recused himself from the cases involved in the instant appeal. *See Cunningham v. Gates*, 45 F.Supp.2d 783 (C.D.Cal.1999). Since that time, the cases have been assigned to a different judge, and, thus, defendants' motion to remove Judge Letts is moot.

[6] We do not discuss motions outside the scope of this appeal. Thus, although the district court dismissed several defendants from this action prior to ruling on the summary judgment motions involved in this appeal, we find it unnecessary to discuss these aspects of an otherwise long and complicated procedural history.

summary judgment, the district court incorporated the reasoning as set forth in its earlier decisions denying the defendants' motions for summary judgment in the *Cunningham* and *Soly* actions. For reasons to be discussed, we affirm in part and reverse in part.

I. Background

All of these actions arise out of the actions and conduct of a special unit of the LAPD – the Special Investigation Section (SIS) – whose purpose was to interdict and apprehend armed, violent career criminals.

A. The Cunningham/Soly Robbery

On May 3, 1995, LAPD detectives received information concerning Cunningham and Soly's involvement in a Simi Valley armed robbery. Having received additional information concerning Cunningham and Soly's criminal activities, SIS members placed Cunningham and Soly under surveillance at approximately 3:00 p.m. on June 26, 1995. After observing the suspects for several hours, SIS officers followed them to what they believed would be the scene of a robbery – the Southwest Liquor and Deli in Newbury Park, California. The officers permitted Cunningham and Soly to rob the store, although the officers had both probable cause and the ability to arrest the armed duo before the robbery was committed. After allowing the two robbers to leave the store and enter their getaway car, SIS officers used their police cars to "jam"[7]

[7] "Jamming" refers to the practice of boxing in a suspect's vehicle with police cars. This practice is generally used by plain-clothed special

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Cunningham and Soly's car into a confined space, thus preventing them from escaping in their vehicle. According to plaintiffs, the officers then, without announcing themselves as police, opened fire with approximately eighteen shotgun blasts and handgun shots, which resulted in Soly's death and Cunningham's permanently disabling injuries. The defendants claim that Cunningham and Soly fired the first shots, a claim supported in Cunningham's criminal trial, where a California jury rejected Cunningham's claim that the officers provoked the use of force.

B. The Grover Smith Shooting

On February 25, 1997, SIS members conducted a surveillance operation focusing on the activities of robbery suspect Michael Smith.[8] On the night of the shooting, SIS detectives observed Michael Smith and three other suspects enter the Classroom Bar with their jacket hoods pulled up over their heads. Shortly thereafter, they exited the bar and drove out of an alley in a Mercury Topaz.

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units, such as narcotics and the SIS. "Jamming" involves the simultaneous and coordinated approach of an armed suspect by unmarked police vehicles, thus giving the officers the tactical advantage of surprise. According to the defendants, this technique prevents suspects from fleeing and potentially endangering the lives of bystanders in a high speed chase through the streets. According to the undisputed affidavit of Captain Daniel Koenig, the LAPD has no practice or policy for the SIS or any other unit to automatically or always use the "jamming technique." Rather, according to Captain Koenig, the officer-in-charge at the scene decides whether and when to use "jamming" based on the exigencies of each tactical situation.

[8] Although they share a common last name, Michael Smith and plaintiff Grover Smith are not related in any way.

SIS Detectives Lawrence Winston and Richard Spelman were part of the surveillance team. A radio announcement informed them of the armed robbery of the Classroom Bar and the suspects' escape by car. A police helicopter broadcasting the suspects' movements reported that their Mercury had driven into a cul-de-sac at Corbin Avenue and Schoenborn Street. Detectives Winston and Spelman approached the location and observed two SIS units converging on the Mercury. They saw muzzle flashes coming from the Mercury and heard the sound of gunfire.

The front passenger door of the Mercury opened and an African-American male wearing dark clothing exited the vehicle and began running towards nearby houses. Detectives Winston and Spelman drove north on Corbin and pulled into a driveway to block the armed suspect's escape. They heard a broadcast reporting the suspect heading in their direction. Immediately thereafter, they saw a young African-American, wearing a white long-sleeved t-shirt and dark jeans, standing on the east side of Corbin. He was looking up and down the street and saw the helicopter. He moved north toward a large tree in front of 8400 Corbin Avenue, hiding for a moment between the tree and the house.

Detectives Winston and Spelman drove toward the man who they believed was the escaped robber, Michael Smith. In fact, the man was not the escaped robber. Rather, the man was plaintiff Grover Smith. Smith had just returned home that evening when he heard the police helicopter flying overhead. Because he had outstanding warrants for his arrest and because police had visited his house earlier in the evening to demand he turn his stereo volume down, Smith mistakenly assumed that the helicopter and police were there for him.

Yelling, "They're coming for us," he rushed out to the backyard, hoping to hide in his garage. He hopped over the wall into a neighbor's front yard and started walking north on Corbin. When he saw the officer's Jeep approaching, he turned and started running the other way. A second car blocked his path. He heard someone yell, "Freeze," and was shot in the leg. Defendants claim they shot at Smith only after he moved his hand towards his waistband as if reaching for a gun. Smith denies making any threatening movements.

C. A "Course of Unlawful Conduct"

Plaintiffs allegations go beyond the immediate circumstances surrounding their shootings. In addition to arguing SIS officers lacked probable cause to use deadly force against them at the time of the shootings, plaintiffs allege they were victims of a "course of unlawful conduct" developed and engaged in by SIS members. Plaintiffs allege evidence of the officers' conduct in the common course incidents, taken together with other evidence, will establish a continuing "course of unlawful conduct" which has the following elements:

1. SIS officers commence surveillance of one or more identified persons suspected of having committed prior armed robberies characterized by a particular *modus operandi*.

2. On a night when a new robbery is expected to occur, SIS officers commence surveillance at or around the time the suspects enter their car on the way to the robbery.

3. They follow the suspects to the scene of the suspected robbery.

4. They ignore probable cause to arrest, and allow the robbery to occur without any effort to prevent it.

5. After the robbery is complete, they "jam" the suspects in a confined space at or inside the suspects' car.

6. Whether or not the suspects offer any actual or legitimately perceived threat, the officers commence shooting at the suspects, and do not stop shooting until all but one of the suspects is dead.

7. They cover up the truth of the relevant events by fabricating evidence that officers only shot persons who posed an immediate threat to the officers or others, and by corroborating the existence of such threats through falsification of police reports and providing perjurious testimony at both civil and criminal trials.

According to plaintiffs, the unlawful "course of conduct" outlined above is knowingly condoned by other named public official defendants, all of whom are in a position to prevent it. Specifically, plaintiffs contend all of the public official defendants knowingly maintain policies that intentionally ignore the officers' "code of silence," assume the truthfulness of officers' versions of use of force events, and unfairly discount or ignore all impeaching evidence. According to plaintiffs, these policies allow police officers to escape accountability for their unconstitutional acts of excessive force. Plaintiffs further argue that SIS officers knowingly rely on these policies and practices when committing unlawful acts of excessive force.

II. District Court Proceedings

A. The Cunningham/Soly Lawsuits

Based on the facts and allegations described above, plaintiffs Cunningham and Soly brought a section 1983 action[9] against the City and the following City officials: 1) SIS officers who participated in the gunfight following the armed robbery of the Southwest Liquor and Deli,[10] 2) SIS officers who participated in the surveillance operation, but did not actually use force against either Cunningham or Soly,[11] 3) various supervising officers who had the alleged authority to control the conduct of SIS officers,[12] 4) police

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[9] In relevant part, section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[10] The following officers exchanged gunfire with Cunningham during the shootout following the armed robbery of the liquor store: David Wixon, Larry Winston, James Harris, and Edward Guiza. Brian Davis, who was actually at the scene of the gunfight, testified that he did not shoot at Cunningham or Soly. Of all the shooting officers, only Davis moved for summary judgment based on qualified immunity.

[11] The following eight officers participated in the surveillance of Cunningham and Soly but were not at the scene of the shootout and did not actually fire their weapons at either Cunningham or Soly: Joseph Freia, John Tortorici, Richard Zierenberg, Gary Zerbey, Richard Spelman, James Tippings, John Helms, and Jerry Brooks.

[12] The following defendants held supervisory roles over the SIS at the time of the Cunningham/Soly shootout: former Chief Willie Williams, Deputy Chief John D. White, and Captain Robert Rochhoft.

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commissioners, 5) various members of the city council, 6) the mayor,[13] and 7) several assistant Los Angeles city attorneys. Given the number of defendants involved in this case, the procedural history of this case is quite lengthy and complex. We review only the relevant aspects of the procedural history of this case.

1. *Heck v. Humphrey*

On February 10, 1997, all defendants moved for summary judgment against Cunningham and Soly pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which holds that a claim under section 1983 that would necessarily imply the invalidity of the plaintiff's state criminal conviction or sentence is not cognizable until the conviction or sentence is overturned. Defendants argued that a finding that the officers used excessive force would invalidate the criminal jury's determination that the officers were justified in using deadly force against Cunningham.[14] The district court rejected

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Plaintiffs also named Captain Daniel Koenig, who replaced Rochhoft after the Cunningham/Soly shootout in July 1995, and Captains Gregory Berg and John Trundle, who preceded Rochhoft.

[13] The district court granted Mayor Richard Riordan's motion for summary judgment based on qualified immunity, reasoning that, as a matter of law, "the power to appoint people who can change undesirable practices is not equal to the power to change those practices directly, and that only people who have the direct power to change those policies can be held liable." *Cunningham*, 989 F.Supp. at 1275-76. Although we express no opinion on the district court's reasoning, we agree that the Mayor was clearly entitled to qualified immunity.

[14] On December 17, 1996, a state jury convicted Cunningham of 1) three counts of attempting to murder SIS officers by firing a weapon at them, 2) Soly's murder by provoking the officers into shooting at the

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these arguments, ruling that "*Heck* does not apply to suits that allege official misconduct unrelated to legal process, such as an unconstitutional arrest without a warrant or the use of excessive force on the arrested person." The district court also found that *Heck* could not bar Soly's section 1983 action because Soly was never prosecuted for events underlying the present lawsuit. Defendants appeal the district court's ruling.

2. Qualified Immunity

With the exception of all but one of the officers who participated in the gunfight with Cunningham and Soly, defendants moved for summary judgment based on qualified immunity. The non-shooting officers[15] argued that plaintiffs failed to show that they had the opportunity to intercede or otherwise caused plaintiffs to suffer constitutional injury. Council members argued that indemnifying officers against punitive damages on a discretionary, case-by-case basis, in good faith compliance with the requirements of California Government Code Section 825(b),[16]

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suspects' car, 3) robbery, and 4) burglary. The jury also found "special circumstances" regarding Cunningham's conviction for killing Soly that would support imposition of the death penalty under California Penal Code § 190.2(a)(17). The jury necessarily determined that Cunningham did not act in self-defense.

[15] The following seven defendant officers were not present at the time of the shootings: Joseph Freia, John Tortorici, Richard Zierenberg, Gary Zerbey, Richard Spelman, James Tippings, John Helms, and Jerry Brooks.

[16] Under Cal. Gov. Code Section 825(b), a public entity, "acting in its sole discretion," may pay punitive damages awarded against a public employee if: (i) the employee was acting within the course and scope of employment during the incident in question; (ii) the employee acted "in

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entitles them to qualified immunity under *Trevino v. Gates*, 99 F.3d 911 (9th Cir.1996). The City attorneys argued that 1) plaintiffs are third parties to whom the city attorney defendants owe no duty and 2) there was no clearly established law at the time of the Cunningham/Soly robbery that a policy of indemnifying officers against punitive damage awards would violate a private citizen's constitutional rights. The police commissioners and supervisors also moved for summary judgment, arguing that the plaintiffs failed to establish that they violated clearly established law.[17] In two separate opinions, the district court denied virtually all of the defendants' motions for summary judgment. *See Cunningham v. Gates*, 989 F.Supp. 1256 (C.D.Cal.1997); *Cunningham v. Gates*, 989 F.Supp. 1262 (C.D.Cal.1997).

a. Denial of SIS officers' motions for summary judgment

As previously mentioned, the district court denied the non-shooting officers' motion for summary judgment. Rather than analyze the individual actions of each officer, the district court focused on plaintiffs' allegations of a department-wide scheme and the actions of the officers who actually shot Cunningham and Soly. The court first

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good faith, without actual malice and in the apparent best interests of the public entity"; and (iii) payment of the punitive damages "would be in the best interest of the public entity."

[17] Under the City Charter, the Board of Police Commissioners is the head of the LAPD. The Board sets overall policy while the Chief of Police manages daily operations and implements the Board's policy direction and goals.

found a disputed fact issue concerning whether officers had probable cause to shoot Cunningham and Soly, explaining that:

> The officers' explanations of why they did not think that they had probable cause to arrest before the robberies occurred, why the robberies could not be prevented, and why it was necessary to shoot everyone who was shot will be examined and compared as among all the alleged common course incidents. Plaintiffs will attempt to demonstrate that the things claimed to have been unintended have happened too often to be attributable to accident or mistake, and that perceived threats that could not have been real occur too often, for the officers' explanations of what happened and why to be credible.

Cunningham, 989 F.Supp. at 1260. The district court never conducted an individualized analysis to determine whether each moving defendant was entitled to qualified immunity based on his or her individual actions. Rather, the district court, after focusing on injuries caused by the shooting officers, concluded that:

> It is settled law . . . that if a group of officers agree that if and when some of them knowingly commit unlawful acts others will falsify records and testify falsely to cover up the truth of the relevant events, all of those involved are liable for the unlawful acts. . . . Proof of plaintiffs' allegations that the SIS officers engage in a continuing course of unconstitutional conduct whereby some commit excessive force with complete impunity and others assist by covering up those unconstitutional acts would constitute proof of violation of clearly established law.

Id. at 1261-62. Apparently unaware of any evidence that the moving defendants participated in the alleged "course of conduct,"[18] the district court found it "necessary to go beyond the declarations submitted by the parties and consider how the officers may be impeached with testimony given on prior occasions and whether an inference might then be drawn that the alleged course of conduct might include the element of planned fabrication of documents and testimony." *Id.* Based on possible impeachment evidence and strategies of which only the court was aware, the district court found that a reasonable juror could find the existence of a "common course of conduct" based on the totality of the evidence, and, thus, denied the moving officers' motion for summary judgment. *See id.*

b. Denial of other City officials' motions for summary judgment

The district court denied all City officials' motions for summary judgment, with the exception of the City Mayor,

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[18] In a revealing footnote, the district court virtually conceded the complete lack of evidence underlying plaintiffs' case:

> Obviously, however, in a circumstance in which plaintiffs' chance of success will depend almost entirely on their ability to impeach the officers by showing that their testimony is untrue, plaintiffs cannot disclose how they intend to do this with too much specificity. The court is also constrained from doing so both for fear of disclosing too much of plaintiffs' case, and for fear of helping plaintiffs make their case. *Suffice it to say here that in deciding the SIS officer motions, the court determined that, notwithstanding the lack of positive evidence to support the plaintiffs' claims, there would be enough impeachment evidence for the case to go to the jury.*

Cunningham, 989 F.Supp. at 1266 n. 7 (emphasis added).

finding that a jury could find that these defendants knowingly acquiesced in the use of excessive force by SIS officers. *See Cunningham*, 989 F.Supp. at 1276. To summarize, the district court reasoned that a reasonable jury could find that the City officials failed to take action to eliminate the officer "code of silence" after publication of the Christopher Commission Report,[19] and, thus, could be held liable under section 1983 for knowingly refusing to "terminate a series of acts by others" which led to Cunningham and Soly's constitutional injuries. *See id.* at 1267. The district court further found that a reasonable jury could find a causal connection between the City official's acquiescence in the "code of silence" and the use of force against Cunningham and Soly.

B. The Smith Lawsuit

Based on the facts described above, Smith also filed a section 1983 action against the City, LAPD officers, police supervisors and commissioners, council members, and City

[19] The Christopher Commission Report (Report) was released in 1991 following the much publicized beating of Rodney King. The Report, published approximately four years before the events giving rise to this lawsuit, identified a number of official policies and practices that contributed to the problem of the use of excessive force by LAPD officers. Specifically, the Report uses the term "officer code of silence" and describes it as follows: "[I]t consists of one simple rule, an officer does not provide adverse information against a fellow officer." The Report makes clear that the existence of the "code of silence" was well-known to high-ranking LAP officials even before the Report was released. The Report describes the "code of silence" as "[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints" of excessive force. Report of the Independent Commission on the Los Angeles Police Department 168 (1991) (the Christopher Commission Report).

attorneys. Based upon allegations identical to those contained in the *Cunningham/Soly* action, Smith argued that City official defendants either used excessive force, acquiesced in the use of excessive force, or engaged in an unlawful policy indemnifying officers against punitive damages in excessive force cases. On September 29, 1997, the district court consolidated the *Smith* case with the *Cunningham/Soly* lawsuits for discovery and pre-trial motions. Defendants in the Smith case moved for summary judgment based on qualified immunity. The district court denied the defendants' motions for reasons set forth in the earlier *Cunningham* decisions.

III. Jurisdiction

A. Collateral Order Exception

In general, we may review only final judgments of a district court on appeal. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (internal quotations omitted). Under the collateral order doctrine, however, we have jurisdiction to review a limited class of prejudgment orders. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The collateral order doctrine permits an appeal from a non-final judgment if three criteria are met: the "order must (1) conclusively determine the disputed questions, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Midland*, 489 U.S. at 799, 109 S.Ct. 1494. The Supreme Court has emphasized that the conditions for collateral order appeal are to be stringently applied to ensure that this narrow exception "never be allowed to swallow the general rule" requiring a judgment to be final

prior to appeal. *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). We therefore determine the applicability of the collateral order doctrine "without regard to the chance that the litigation at hand might be speeded, or a particular injustic[e] averted by a prompt appellate court decision." *Id.* (internal citation and quotation marks omitted).

1. Qualified Immunity

We have jurisdiction to review a district court's order denying summary judgment on a qualified immunity defense under the collateral order doctrine. *See Armendariz v. Penman*, 75 F.3d 1311, 1316 (9th Cir.1996). "However, our jurisdiction is limited to purely legal issues." *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir.1998).

2. *Heck v. Humphrey*

We need not address whether the *Heck* issue meets the first and second prongs of the test outlined above because it is effectively reviewable on appeal. Appellate courts can effectively review a district court's ruling on a *Heck* issue because, unlike immunity rights where the right is lost if the case goes to trial, an appellate court can reverse the district court after entry of a final judgment without departing from the holding or purpose of *Heck*.

3. Municipal Liability

The rule announced in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), that individual defendants can appeal from the denial of a motion for

summary judgment to obtain review of the merits of their qualified immunity defense does not empower a federal court to consider the denial of a municipality's motion for summary judgment in a section 1983 action. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 42-43, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

B. Pendent Appellate Jurisdiction

Arguing in the alternative, defendants contend that we have pendent appellate jurisdiction to review the district court's *Heck* ruling and its denial of summary judgment for the City. Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on interlocutory appeal if raised in conjunction with other issues properly before the court. In *Swint*, the Supreme Court set out a general rule against exercising pendent jurisdiction over related rulings but left open the possibility that appellate courts could extend such jurisdiction if the rulings were "inextricably intertwined" or if review of the pendent issue was necessary to ensure meaningful review of the independently reviewable issue. *See id.* at 44 n. 2, 50-51, 115 S.Ct. 1203 (following "review of the independently reviewable issue").

We have consistently interpreted "inextricably intertwined" very narrowly.[20] In *California v. Campbell*, 138

[20] Unlike the D.C. Circuit, we have consistently given *Swint* a very narrow reading. *Compare Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C.Cir.1997) (allowing pendent review if such review will terminate the entire case, sparing both the appellate and district courts from further proceedings and giving the parties a speedy resolution),

(Continued on following page)

F.3d 772 (9th Cir.1998), for instance, we stated that "[g]iven the Supreme Court's criticism of pendent appellate jurisdiction, the Court's 'inextricably intertwined' exception should be narrowly construed." *Id.* at 778. "[M]ore is required than that separate issues rest on common facts." *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1113 (9th Cir.1999). Two issues are not "inextricably intertwined" if we must apply different legal standards to each issue. Rather, the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, *see, e.g., Paige v. California*, 102 F.3d 1035, 1040 (9th Cir.1996), or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue, *see, e.g., Marks v. Clarke*, 102 F.3d 1012, 1018 (9th Cir.1996).

1. *Heck v. Humphrey*

The *Heck* issue is not "inextricably intertwined" with the qualified immunity issues properly before us on interlocutory appeal, nor is it necessary to decide the issue to ensure meaningful review of the defendants' qualified immunity claims. The issues properly before us on interlocutory appeal are analytically distinct from the *Heck* analysis. In order to decide the qualified immunity claims, we must determine 1) whether non-shooting officers are entitled to qualified immunity because "jamming" does not

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with Paige v. California, 102 F.3d 1035, 1039 (9th Cir.1996) (rejecting judicial economy as a basis for pendent review).

violate clearly established law, 2) whether council members are entitled to qualified immunity because a policy of indemnifying officers against punitive damages does not violate clearly established law, and 3) whether City attorneys are entitled to qualified immunity because recommending that council members indemnify officers against punitive damage awards does not violate clearly established law. These analyses do not implicate the validity of Cunningham's criminal conviction. Moreover, for reasons to be discussed, we lack jurisdiction to review the only two issues arguably intertwined with the *Heck* analysis: 1) whether the shooting officers used excessive force against Cunningham and Soly and 2) whether the commissioners and supervising officers failed to take adequate steps to prevent the alleged use of excessive force. Thus, we find that we lack jurisdiction to review the district court's denial of defendants' motion for summary judgment pursuant to *Heck v. Humphrey*.[21]

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[21] Although we lack jurisdiction to review the district court's denial of summary judgment based on *Heck v. Humphrey*, we feel compelled to express our serious disagreement with the district court's ruling. It seems quite clear that Cunningham's section 1983 action would be barred under *Heck* and its progeny. In Cunningham's criminal trial, a jury rejected virtually every issue raised in Cunningham's section 1983 action. Moreover, it seems quite likely that Soly's action would also be *Heck*-barred based on California's common law of privity. Under governing Ninth Circuit precedent, a district court has discretion to depart from the law of the case established by prior rulings if the first decision was clearly erroneous or a manifest injustice would otherwise result. *See United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir.1998). Thus, for reasons outlined above, we encourage the parties in this case and the judge who replaced Judge Letts to revisit this issue.

2. Municipal Liability

The City argues that the district court erred in denying its motion for summary judgment because (1) the alleged violation is contingent upon a violation of a constitutional right and (2) plaintiffs have no cognizable constitutional claim. After examining whether the City's appeal is "inextricably intertwined" with any of [sic] rulings we have jurisdiction to review, we conclude that we lack jurisdiction to review the City's appeal.

a. Officers' appeal

Plaintiffs challenge the City's policy, custom and usage, is not "inextricably intertwined" with the SIS officers' qualified immunity claims. *See Chew v. Gates*, 27 F.3d 1432 (9th Cir.1994) (holding that the liability of Los Angeles for a police dog bite was separate from the officer's qualified immunity defense). Whether the City's policy, customs, or usage caused plaintiffs' injuries is a separate inquiry from whether the non-supervisory officers are entitled to qualified immunity. *See id.*

b. Policy-making defendants' appeals

In a recent decision, we held that a municipality's appeal in a section 1983 case was "inextricably intertwined" with a policy-making city attorney's appeal from a denial of summary judgment based on qualified immunity. *See Huskey v. City of San Jose*, 204 F.3d 893, 906 (9th Cir.2000). Our *Huskey* decision relied on the plaintiff's failure to demonstrate that the city attorney's actions deprived him of his constitutional rights. *See id.* Because the plaintiff's failure to demonstrate actual injury necessarily resolved the city's appeal, we found the two appeals

"inextricably intertwined" and exercised jurisdiction over the city's appeal. *See id.*

Unlike our *Huskey* opinion, our decision does not necessarily resolve the City's appeal by determining that plaintiffs did not demonstrate an actual injury. *Cf. Marks,* 102 F.3d at 1018. Rather, because the question of actual injury involves factual disputes outside of our scope of review, today's decision assumes plaintiffs may be able to convince a jury that they suffered constitutional injuries caused by some combination of police action and city official inaction. *See V-1 Oil Co. v. Smith*, 114 F.3d 854, 856 (9th Cir.1997) (holding that court will exercise "jurisdiction over an interlocutory appeal that present[s] the question whether, assuming the disputed facts in favor of the nonmoving party, the moving party was entitled to qualified immunity"). Thus, we lack jurisdiction to review the City's appeal from the district court's denial of its summary judgment motion because this issue is not "inextricably intertwined" with any of the issues properly before us on interlocutory appeal.

IV. Qualified Immunity

A. Legal Landscape

1. Jurisdiction

As noted above, we have jurisdiction to hear an interlocutory appeal from a denial of qualified immunity when the question involves a matter of law. *See Mitchell,* 472 U.S. at 528, 105 S.Ct. 2806. However, where the district court denies immunity on the basis that material facts are in dispute, we generally lack jurisdiction to consider an interlocutory appeal. *See Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir.1996). More precisely, if the

appellant argues that, contrary to the district court's opinion, an examination of the record reveals that a factual dispute does not exist, or that there is not sufficient evidence in the record to create such a factual dispute, we must dismiss for lack of jurisdiction. *Id.* Nevertheless, a denial of summary judgment on qualified immunity grounds is not always unappealable simply because a district judge has stated that there are material issues of fact in dispute. *See Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). An appellate court still has jurisdiction to consider defendants' assertion that the dispute of fact *is not material. See Collins,* 110 F.3d at 1370. This is different from a claim that the court's findings are not supported by the record, as a claim of materiality is solely one of law, and therefore is reviewable on an interlocutory basis. The claim of lack of materiality is solely one of law, and therefore is reviewable on an interlocutory basis. *Id.*

2. Analytical Framework

In *Harlow v. Fitzgerald*, the Supreme Court set forth the applicable legal standard for qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Five years later, in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Court clarified the objective test it set forth in *Harlow,* explaining that a district court must decide whether a reasonable public official would know that his or her *specific conduct* violated clearly established

rights. *Id.* at 636-37, 107 S.Ct. 3034. In *Anderson,* the plaintiff sued an FBI agent for damages based on the warrantless search of his house. The district court granted summary judgment to the agent on the ground that the search was lawful, holding that the undisputed facts revealed that the agent had probable cause to search the plaintiff's home and that any failure to obtain a warrant was justified by the presence of exigent circumstances. The Eighth Circuit reversed, holding that the FBI agent was not entitled to summary judgment on qualified immunity grounds, because the right he was alleged to have violated – the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. *See id.* at 637-38, 107 S.Ct. 3034.

The Supreme Court reversed, framing the issue as follows:

> The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. . . . *It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.* We have recognized that it is inevitable that law enforcement officers will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held

> personally liable. The same is true of their conclusions regarding exigent circumstances.

Id. at 640-41, 107 S.Ct. 3034 (citation omitted) (emphasis added).

Having focused its analysis not on the alleged violation of the right, but on whether a reasonable public official would know that his or her specific conduct violated clearly established rights, the Court held that a "law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." *Id.* at 636-37, 107 S.Ct. 3034.

At least one of our sister circuits has taken heed of the narrower focus required by *Anderson* and required "a court faced with whether a claim of qualified immunity properly was denied to engage in an analysis of the facts adduced concerning the conduct of the official who claims immunity." *Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir.1996). We agree with this approach. In short, in resolving a motion for summary judgment based on qualified immunity, a court must carefully examine the specific factual allegations against each individual defendant (as viewed in a light most favorable to the plaintiff). *See V-1 Oil,* 114 F.3d at 856. Although the district court correctly recited the legal principles governing its resolution of the qualified immunity issue as established in *Harlow* and *Anderson,* its analysis fell far short of the fact-intensive inquiry those cases require. Our analysis corrects this error and examines each defendant's claim of qualified immunity on the basis of undisputed facts concerning the relevant specific conduct.

In establishing this methodological inquiry and applying it to the case before us, we are mindful of our responsibility to determine the appropriate level of generality at which to analyze the right at issue: we must not allow an overly generalized or excessively specific construction of the right to guide our analysis. The Supreme Court has admonished that the right alleged to have been violated must not be so broadly defined as to "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034. On the other hand, we have also cautioned that the right can not be so narrowly construed so as to "define away all potential claims." *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.1995).

The danger, of course, in analyzing a scheme through its component parts is that this compartmentalization could potentially accomplish what *Kelley* prohibits via an alternative route: by too narrowly focusing on, or delineating, the constituent elements of an overall scheme, the universe of rights impacted by the specific compartmentalized action can be substantially constricted or narrowed.[22] Here, however, we are not faced with such a situation. The police officers do not attempt to deconstruct the alleged scheme into unreasonably narrow or limited component parts in such a manner as to "define away all potential claims." Rather, the actions we analyze below are naturally and logically differentiated, and they potentially

[22] Indeed, many cases of qualified immunity are not even susceptible to the analysis we conduct here as they involve either a solitary act or a course of conduct that is not reasonably divisible.

impact on well-established rights under which a plaintiff may reasonably have a valid claim.

B. Shooting Officers

Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Determining whether force used in making an arrest is excessive or reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. 1865. We have recently reiterated that the test for qualified immunity in excessive force cases is the same as the test on the merits. *See Katz v. United States*, 194 F.3d 962, 968 (9th Cir.1999).

1. Cunningham/Soly

Plaintiffs allege that the SIS used excessive force against them when the officers fired repeated shotgun blasts into plaintiffs' car after the officers failed to announce that they were police. The district court found a disputed fact issue concerning "what was going on in the officers' minds – what they saw, and what they thought." *Cunningham,* 989 F.Supp. at 1260. Because the district court found material factual disputes, i.e., whether the officers had probable cause to use deadly force against Cunningham and Soly, we lack jurisdiction to review whether the shooting officers are entitled to qualified

immunity. *See Collins,* 110 F.3d at 1370. Thus, for purposes of this opinion, we must assume that the plaintiffs can prove that they suffered a constitutional injury.

2. Smith

Although the district court did not specifically identify material issues of fact regarding the shooting of Smith, such disputes are easily gleaned from the record. Defendants argue that the SIS officers who shot Smith reasonably mistook him for the fleeing suspect who they knew to be armed. Defendants also argue that they shot only after Smith moved his hand towards his waistband as if reaching for a gun. Smith claims that he made no threatening movements. Given this factual dispute, the shooting officers are not entitled to qualified immunity. A reasonable juror could find that Smith suffered a constitutional injury when the officers mistook him for a fleeing felon and shot him without reason to believe that he was reaching for his gun.

C. Non-Shooting Officers

As previously mentioned, the district court failed to analyze the acts of each individual defendant in its qualified immunity analysis. Rather, in denying the non-shooting officers' motion for summary judgment, the district court made the following general remarks:

> It is settled law . . . that if a group of officers agree that if and when some of them knowingly commit unlawful acts others will falsify records and testify falsely to cover up the truth of the relevant events, all those involved are liable for the unlawful acts. An official is liable in his

> individual capacity if he "set[ ] in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he kn[e]w or reasonable [sic] should [have] know[n], would cause others to inflict constitutional injury. . . . " Proof of plaintiffs' allegations that the SIS officers engage in a continuing course of unconstitutional conduct whereby some commit excessive force with complete impunity and others assist by covering up those unconstitutional acts would constitute proof of violation of clearly established law.

Cunningham, 989 F.Supp. at 1261 (internal citations omitted). This statement falls far short of the individualized analysis we require for resolving motions for summary judgment based on qualified immunity. In the following sections, we conduct the individualized analysis that the district court failed to perform, examining each of the following elements of the alleged "common course" of unlawful conduct: 1) failure to arrest, 2) failure to intercede, 3) use of the "jamming technique," 4) perjury and conspiracy to commit perjury, and 5) fabricating evidence.

1. Failure to Arrest

Plaintiffs first argue that the defendants violated their constitutional rights because they could have arrested the criminal suspects before the armed robberies occurred, and, thus, avoided the need to use deadly force. Plaintiffs' argument lacks merit.

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and

> a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Hoffa v. United States, 385 U.S. 293, 310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Plaintiffs' allegations that the SIS officers deliberately allowed Cunningham and Soly to commit their crimes, despite having probable cause to arrest them, does not state a violation of a constitutional right.

2. Failure to Intercede

Defendants concede that "police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir.1994), *rev'd on other grounds*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). Importantly, however, officers can be held liable for failing to intercede only if they had an opportunity to intercede. *See Bruner v. Dunaway*, 684 F.2d 422, 426-27 (6th Cir.1982) (holding that officers who were not present at the time of the alleged assault could not be held liable in a section 1983 action); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n. 3 (1st Cir.1990) (granting arresting officers' motion for summary judgment because the officers had no "realistic opportunity" to prevent an attack committed by another officer). In this case, officers who were not present at the time of the shootings could not intercede to prevent their fellow officers from shooting

at Cunningham, Soly and Smith. Moreover, the undisputed evidence shows that the non-shooting officers who were present at the shootouts had no "realistic opportunity" to intercede. Thus, we find that the non-shooting and non-present officers cannot be held liable for failing to intercede to prevent the shooting of the plaintiffs in the instant case.

3. "Jamming"

A police officer's right to make an arrest necessarily includes the right to use some degree of force. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In *Mendoza v. Block*, 27 F.3d 1357 (9th Cir.1994), we held that novel police practices that have not been tested in the courts may still violate clearly established law if the force involved in the practice "violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure." *Id.* at 1362 (quoting *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir.1986)). In these situations, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Id.*

In *Chew v. Gates*, 27 F.3d 1432 (9th Cir.1994), we further explained the qualified immunity analysis when faced with a novel police practice:

> [W]e do not mean to suggest that all actions taken pursuant to a longstanding policy are necessarily immunized. An officer who unlawfully implements an official policy or ordinance in an egregious manner or in a manner which clearly exceeds the reasonable bounds of the policy is not entitled to qualified immunity, whether or not there is a case on point declaring such actions

> unconstitutional. In other words, even in the absence of relevant case law, if the manner of implementation of an otherwise constitutional policy is not only unconstitutional, but patently so, the officer will be deemed to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Moreover, the existence of an unofficial or unacknowledged policy or practice is not sufficient to immunize an officer from liability.

Id. at 1450 (internal citation omitted).

Plaintiffs allege that all officers participated in a "course of conduct" which included the use of "jamming" suspects into confined spaces in an effort to provoke the use of force. Whether the defendants are entitled to qualified immunity for their actions in formulating or implementing the "jamming" policy "turns on the objective legal reasonableness of the action . . . assessed in light of legal rules that were clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (internal cites and quotation marks omitted). For reasons to be discussed, we find that a reasonable law enforcement officer might well have failed to recognize that authorizing or implementing the "jamming" technique would lead to a violation of the plaintiffs' constitutional rights.

According to the undisputed evidence, the use of the "jamming" technique constituted neither a new nor unique policy when the Cunningham and Soly shootings occurred. Additionally, the uncontroverted evidence indicates that the "jamming" technique had been used hundreds of times without incident, and the plaintiffs do not present any evidence that the technique was used against them in a

different and unreasonable manner relative to the past incidences of "jamming" the defendants submitted as evidence.

Moreover, given the circumstances surrounding its use, the jamming technique was a reasonable use of force for the purposes of the Fourth Amendment. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865; *see also Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir.1994) (quotation and citation omitted) (holding that the "reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted"). Here, the officers were confronted with armed individuals in the midst of committing a dangerous felony.[23] Accordingly, we hold that it was not clearly established at the time of the shootings that the "jamming" technique was an unreasonable use of force.[24]

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[23] By no means are we endorsing any police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force. The police officers, as we noted, were not required to make an arrest at any given point during the commission of the crime. *See Hoffa*, 385 U.S. at 310, 87 S.Ct. 408. Therefore, their decision to arrest the individuals after the crime had been committed cannot be said to have unreasonably created a dangerous situation.

[24] We do not mean to suggest the use of the "jamming" technique is a per se reasonable use of force to effectuate arrest. Rather, because plaintiffs fail to respond to the defendants' evidence regarding the well-established use of the jamming technique and offer no evidence indicating that the technique was employed against them in a manner different from its past usage, we find that the defendants are entitled to qualified immunity from suit in this case.

We also find that the use of the "jamming" technique was too attenuated from the use of deadly force against Smith to support his action against the officers who participated in that operation. The shooting of Smith did not occur until after several events occurred: 1) officers jammed the suspects' vehicle (a practice which we have already found not prohibited by clearly established law), 2) the armed suspect fled the police, 3) police searched for the armed suspect for an extended period of time, and 4) Smith decided to run from the police while screaming, "They're coming for us!" Given these facts, we find that the "jamming" incident is too attenuated from the alleged use of excessive force against Smith, and, thus, is immaterial to the question of whether he suffered an injury of constitutional proportion.

4. Perjury and Conspiracy to Commit Perjury

Even assuming plaintiffs had evidence of individual defendants perjury or conspiracy to commit perjury, we find that the non-shooting officers are entitled to immunity from suit. First, as witnesses, these defendants are "absolutely immune from damages liability based on their testimony." *Briscoe v. LaHue*, 460 U.S. 325, 326, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Second, these defendants are similarly entitled to absolute immunity from damages liability for any alleged conspiracy to commit perjury. *See Franklin v. Terr*, 201 F.3d 1098, 1102 (9th Cir.2000) (holding that "the rule of *Briscoe* applies to allegations of conspiracy to commit perjury by someone who has testified as a witness in the proceeding where the perjury took place"). Obviously, testimonial immunity does not encompass non-testimonial acts such as fabricating evidence.

5. Fabricating Evidence

Plaintiffs allege that all of the non-shooting officers participated in a "course of conduct" which included fabricating evidence to support their fictitious version of events in excessive force cases. The plaintiffs offer not an iota of evidence that the non-participating officers in this case ever fabricated evidence. Rather, plaintiffs rely on conclusory allegations and a report published by the Christopher Commission several years before the events giving rise to the instant actions, which says nothing about the individual conduct of any of the officers involved in the action. Given the complete lack of evidence suggesting any of the defendant officers fabricated evidence, we find that none of the defendant officers can be held liable for their alleged involvement in fabricating evidence.

D. Supervisors and Commissioners

The district court found material fact disputes concerning whether police supervisors and commissioners were liable for actions taken as supervisors. *See Cunningham*, 989 F.Supp. at 1268. Supervisors can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991) In this case, the district court found the following:

> [O]n the basis of the Christopher Commission Report and of both positive evidence and lack of contrary evidence that there has been no change, that the officer code of silence and the preference for believing officer versions of excessive force

> incidents over other more credible evidence have existed continuously from the date of release of the Christopher Commission Report. A jury could also find that if excessive force was used by the SIS officers in this case, there is a causal connection between these policies and the use of force against [the plaintiffs].

Cunningham, 989 F.Supp. at 1268. Although the evidence seems to clearly suggest that the commissioners took numerous steps to implement the recommendations of the Christopher Commission, and although evidence of supervisor misconduct seems virtually nonexistent, because the district court found material factual disputes, we lack jurisdiction to review the district court's denial of qualified immunity for police supervisors and commissioners. *See Collins*, 110 F.3d at 1370.

Notwithstanding our inability to review the district court's finding of factual disputes, we reverse the denial of summary judgment as to Captain Daniel Koenig in the Cunningham/Soly action. The undisputed evidence clearly shows that Captain Koenig did not assume a supervisory position over the SIS until nearly one month after the Cunningham/Soly shootout. Captain Koenig cannot incur supervisory liability for conduct that occurred before he became a SIS supervisor.

E. City Council Members

Plaintiffs allege that the council members effectively promoted and ratified the use of excessive force by SIS officers by voting to indemnify SIS officers against punitive damage awards in excessive force cases. For reasons discussed below, we reject the plaintiffs' argument and

reverse the district court's denial of qualified immunity for the council members.

In *Trevino v. Gates*, 99 F.3d 911 (9th Cir.1996), we examined whether council members could be liable under section 1983 for voting to indemnify LAPD officers against punitive damage awards in excessive force cases like those presently before us. We held that the council members were entitled to qualified immunity because the law was not clearly established that a policy of indemnifying punitive damage awards violates constitutional rights. *See id.* at 918. We observed that:

> A city council does not violate section 1983 if it indemnifies officers against punitive damage awards on a discretionary, case by case basis, and complies in good faith with the requirements of Cal.Gov.Code § 825(b).

Id. Plaintiffs contend that since *Trevino* the law has been clearly established that a policy of indemnifying punitive damage awards violates constitutional rights.

The Cunningham/Soly incident occurred nearly one year before we decided *Trevino*. As a matter of chronological necessity, it was not clearly established before or at the time of the Cunningham/Soly incident that voting to indemnify officers against punitive damage awards could violate constitutional rights. Thus, even assuming that these decisions somehow promoted the alleged use of excessive force in the Cunningham/Soly incident, the council members are clearly entitled to qualified immunity for lawsuits based on pre-*Trevino* decisions to indemnify officers against punitive damage awards.

The Smith incident occurred approximately four months after we decided *Trevino*. In order to defeat the

council members' motion for summary judgment in the Smith case, Smith must present some evidence that the council members did not implement section 825's indemnification procedure in good faith in the four month window between the *Trevino* decision and the Smith incident. Smith failed to meet this burden.

The council members submitted evidence indicating that they followed *Trevino*'s instruction by evaluating officers' indemnification claims in good faith and on a case-by-case basis. Specifically, the council members point to the following evidence:

> In *Guerra v. City of Los Angeles*, the council members deliberated for three days before deciding to indemnify an officer against a punitive damage award in an excessive force case. The council members repeatedly deferred voting until they received additional information and had a chance to confer with their attorney.
>
> In *Clark v. City of Los Angeles*, the council members again held multiple sessions before deciding to indemnify an LAPD officer in an excessive force case.
>
> In *Tave v. Gates*, the council members actually *refused to indemnify* an LAPD officer against a punitive damage award, despite the recommendation of the City Attorney that they do so.

The council members' evidence suggests that they implemented section 825's indemnification procedure in good faith in accordance with *Trevino*. Indeed, rather than following a policy of rubber-stamping City Attorney recommendations, the undisputed evidence shows that the council members considered each claim on a case-by-case basis. Smith's conclusory allegations cannot withstand the

council members' motion for summary judgment. Thus, we reverse the district court's denial of summary judgment.

F. City Attorneys

City attorneys cannot be held liable for their participation in the indemnification process unless it was clearly established that an indemnification policy would be unconstitutional. Based on our decision granting summary judgment to the council members in both the Cunningham/Soly and Smith actions, we find that the district court erred when it denied the City attorneys' motion for summary judgment. Because it was not clearly established that City attorneys could be held liable to future plaintiffs based on their indemnification recommendations in excessive force cases, we hold that the City attorneys are entitled to qualified immunity from suit.

V. Injunctive Relief

We find that the plaintiffs lack standing to challenge the policies and practices they seek to enjoin. *See Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

VI. Conclusion

For the aforementioned reasons, we affirm the district court's denial of summary judgment to the shooting officers, the police commissioners, and the supervising officers (with the exception of Captain Daniel Koenig in the Cunningham/Soly action). Otherwise, we reverse the district court's denial of summary judgment to the non-shooting officers, the council members, the City attorneys,

and Captain Daniel Koenig in the Cunningham/Soly action. Each party to bear its own costs.
